



JUDICIAL STUDIES
BOARD

CROWN COURT BENCH BOOK

DIRECTING THE JURY

MARCH 2010

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FOREWORD BY THE LORD CHIEF JUSTICE

This new Judicial Studies Board Crown Court Benchbook was prepared by Mr Justice Pitchford (as he then was) after he considered what was needed to bring the vast array of valuable JSB training materials for use in the Crown Court up to date, and arranged in a format that accommodates both the recent deluge of primary legislation, and the many appellate decisions in which the legislation has been interpreted.

It was clearly a formidable task. He rose to it with admirable rigour, clarity and depth. The end result is remarkable for its comprehension and, I hope, in due course, its utility. We all have cause to be grateful to him.

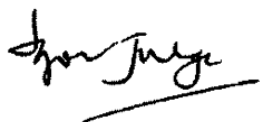
We are all familiar with the so-called “specimen directions” for juries. We read of them in the news. We hear much about them in the Court of Appeal. And, of course, we use them in the Crown Court. But the great value of the specimen direction has also the potential to be a weakness. What was intended to provide guidance and assistance to judges has, on many occasions, to all intents and purposes, operated as if judges were bound by them when they were preparing their summing up and sometimes the specimen directions have been incanted mechanistically and without any sufficient link with the case being tried.

In this Benchbook, the objective has been to move away from the perceived rigidity of specimen directions towards a fresh emphasis on the responsibility of the individual judge, in an individual case, to craft directions appropriate to that case.

In the absence of specimen directions, one could be forgiven for asking the question what, then, is the role of the Benchbook? The answer to that question is simple: the role of the Benchbook is integral to the role of the modern judge. Through its thorough exposition of the summary of the relevant law, bullet pointed ingredients for directions, some essential, most calling for a judgment as to relevance,, and illustrative examples, it guides the judge in the crafting of directions, and should be a useful starting point of reference on the Bench.

Save where the Court of Appeal (Criminal Division) has so ruled, the contents of the Benchbook have no legal authority. Too often it has been submitted in the Court of Appeal that a judge’s failure to follow a specimen direction has rendered the conviction unsafe, and we have had to emphasise that the directions are not binding. Contrary to good practice, advocates’ closing speeches often include words to the effect of “His Honour the judge will tell you this...” or “Her Honour will say that...” followed by a pre-emptory reference to the contents of one or more specimen directions. The caution induced by such inappropriate practices is fuelled by a too-ready propensity to argue before the Court of Appeal that the specimen directions should have been given in full, or that an unmerited departure from the specimen text took place. That culture must change and I hope that this Benchbook will go a significant way towards achieving that aim.

Of course, it would be unrealistic to attempt an instant crossover from specimen directions to self-crafted directions. All lawyers, judges included, resort to precedent. Many judges have crafted their own library of directions which may be tailored from case to case, and, providing the directions given are appropriate to the case and reflect the current law, I encourage that practice to continue. Others find great assistance in the specimen directions. For that reason, the JSB will not be “withdrawing” the earlier directions but unlike the new Benchbook, the earlier JSB materials will not be updated. Judges should rely on this new Benchbook, and, tailor their directions accordingly. In that, and with great thanks to Lord Justice Pitchford, I wish them every success.

A handwritten signature in black ink, appearing to read 'Lord Judge', with a horizontal line underneath.

Lord Judge
Lord Chief Justice of England and Wales

INTRODUCTION TO THE CROWN COURT BENCHBOOK

In the 1970s the Judicial Studies Board began to publish Specimen Directions whose purpose was to assist trial judges preparing their legal directions to juries in summing up. The JSB has never claimed legal infallibility and aspired only to give advice. The authors of the Specimen Directions presented models which could be adapted to any factual context but, on appeal, variation from the JSB model was liable to attract criticism from the appellant advocate or the Court. As a result, the temptation was to take the 'safe' option of reading the specimen into a summing up without sufficient adaptation to the requirements of the case. In 2008, with the encouragement of the Vice-President, Latham LJ, and, later, Lord Judge CJ, the Criminal Group at the JSB commenced a wholesale review of the Benchbook. After a stuttering beginning the bulk of the work was undertaken in the second half of 2009. Much of it fell, conveniently, within the period of moratorium for implementation of the Judicial Training Strategy. This was a major undertaking and the Criminal Group at the JSB is grateful for the judicial and academic time granted to complete it.

The Benchbook was designed as an electronic reference work. Judges are well familiar with the use of electronic research and the format we have chosen is conducive to it. Electronic production has given us the freedom to include material which we might otherwise have omitted, and it has provided the opportunity to make extensive use of the hyperlink to original materials. The decision has been made to produce the first edition also in hard copy. Our intention is to update the Benchbook at annual intervals.

In expressing the task faced by trial judges we have frequently needed to refer to the individual judge. Using gender neutral phraseology can, in a context such as this, be distracting. For that reason alone we have called the judge 'he' and, of course, 'he' includes every judge, male or female.

We wish to express our gratitude to the many judges who responded to the request from the Director of Studies, HH Judge John Phillips, to contribute to the review. Some of the suggestions made will be recognised by their authors in the current work. The final draft of the Benchbook has been in circulation among Criminal Group Course Directors and Tutor Judges for consultation before publication. We are grateful for their helpful suggestions for improvement. The process of consultation is not complete. We seek from practitioners and judges continuing notification of any errors or omissions, or suggestions for improvement.

Special thanks are due to Professor David Ormerod, Professor of Law, Queen Mary, University of London, for his invaluable contribution as consultant to the project. Responsibility for the contents remains, however, entirely with the Judicial Studies Board.

Finally, we wish to acknowledge the remarkable quality of the work done by former judicial draftsmen of the JSB Specimen Directions. As the project has progressed, our admiration for our predecessors has just grown and grown.

HOW TO USE THE BENCHBOOK

It is intended that the Benchbook should be a point of reference for judges preparing legal directions for a summing up. Most of the materials will be familiar to you but they have been put together in one reference work aimed specifically for the use of judges. The Contents pages at the front of the Benchbook are intended to serve both as an index and as a checklist.

It is important to remember that this Benchbook is not intended to be a direct replacement for, nor should it be used as if it were, the Specimen Directions. However, for a transitional period the Specimen Directions will continue to be available because we recognise that judges are familiar with them and some will wish to continue to consult them. The Specimen Directions are not, however, necessarily up to date and particular attention should be paid to their various dates of issue.

Depending upon the subject, you will find that either the advice on directions is given in bullet point or numbered paragraph form (see, for example, Chapter 2 Preliminary Directions) or the subject is divided into three parts: **Introduction**, **Directions** and *Illustration* (see, for example, Chapter 5 The Prosecution Case and Principles of Criminal Liability).

The purpose of the **Introduction** is to explain why and in what circumstances a direction is required.

Observations by the Court of Appeal, the House of Lords or Supreme Court as to the necessary or appropriate contents of the direction have been included. Where a direction may create a particular problem for trial judges an attempt has been made to analyse it and to suggest what should or might be the trial judge's approach. We have done our best to achieve legal accuracy but the JSB does not claim to have provided an infallible or complete summary of the relevant law or, where it appears, an unimpeachable analysis of a particular practical difficulty which faces trial judges. You will notice that in many instances the phrase "it is suggested that" is used to signify that the author does not regard the point as settled but is proposing what may be a legitimate approach to its solution.

The purpose of the **Directions** section is to identify in bullet point form both those directions which are required and those which ought to be under consideration when you are preparing the relevant direction. In order to take full advantage of the Directions it is advisable to read the Introduction as well. This is because the introductory material often demonstrates how the terms of a legal direction will depend upon the particular issues revealed by the evidence.

An *Illustration* has been provided where it is thought that it will assist to illustrate the legal direction required. The evidential context, where there is one, is, of course, hypothetical although sometimes loosely based on the facts of an actual case. In several chapters or sections you will find an illustration of a *Route to Verdict* tailored to the same hypothetical evidential context. The appropriate use of a *Route to Verdict* is considered in Chapter 1.

An illustration of the way in which a direction might be given is just that. It should not be treated as a "specimen". It is there to provide the reader with ideas, including ideas as to how it can be improved. Some Illustrations are based on complicated factual situations and deal with other linked legal issues. That is because it is often the explanation of complicating factors (e.g. the relevance of drunkenness in self-defence) which creates the practical difficulty for a judge engaged in explaining the law to the jury.

Each section concludes, as before, with a reference to sources other than those specifically identified in the footnotes. They are usually references to the latest edition of Archbold, Blackstone (currently 2010), Smith and Hogan, 'Criminal Law', 12th Edition, Rook and Ward, 'Sexual Offences', 3rd Edition, and to Professor John Spencer's work on Bad Character, 2nd Edition, and Hearsay. We recommend that judges should be familiar with relevant sections of the Equal Treatment Benchbook, particularly those concerning the treatment of children in criminal proceedings (Part 4, chapter 4.4) and those with disabilities (Part 5).

In Chapter 1 we have drawn attention to the role and purpose of the summing up in the modern jury trial and to good practice as identified by experienced judges. The terms in which a judge seeks to achieve clarity and, where possible, brevity is very much a matter for individual judgement and preference. We suggest that the Court of Appeal will be interested not so much in whether precedent has been followed but in whether the legal direction chosen was clear and appropriate.

Christopher Pitchford
Director of Training, Criminal Group
March 2010

CHAPTER 1: STRUCTURE AND CONTENT OF THE SUMMING UP

Trial by Jury

Our system of jury trial remains much as it has been for many generations but the burden of the juror's task has changed markedly. Advances in technology, communication and science, and the complexity and sophistication of the modern criminal law and the law of evidence, have created new challenges for jurors and trial judges alike. Some trials are very long. The more we focus upon jurors' needs in the management and conduct of trials, and in summing up, the better able the jury will be to perform their task accurately and confidently.

Jury Service

Jurors will usually come to the experience for the first time. They will be unfamiliar with the law which they need to apply. Many will never have engaged in the process of reaching a community of view by analysis of evidence. While jurors in waiting receive much useful information and advice at the Crown Court, the scale of the obligation they undertake should not be underestimated. Many of them will be anxious about their performance of an important public duty even within the privacy of the jury room. The first responsibility of the trial judge, we propose, is to assist each member of the jury to understand and perform his or her duty to return a true verdict according to the evidence. That responsibility includes ensuring that jurors quickly become acclimatised to the courtroom and to the business of trial. Much can be achieved by introductory, explanatory and reassuring words at the outset.¹ Time taken at this early stage to explain their task, their responsibilities as judges, and the arrangements which will be made for their convenience, will do much to avoid frustration and alienation, particularly in a long trial. The list of possible topics raised in Chapter 2 serves to illustrate what can go wrong without appropriate guidance at an early stage in the proceedings.

The Purpose of the Summing Up

The task of the trial judge in summing up is to present the law and a summary of the evidence in such a way as best to enable the jury to reach a just conclusion.² That can be achieved only if the trial judge communicates effectively to the jury the issues which they need to resolve and their legitimate approach to the evidence relevant to those issues. Resort to legal phraseology is not likely to be helpful if suitable alternatives in plain English are available.

The trial judge is in the perfect position to form a judgement how best to craft the summing up. How that assistance is achieved is entirely for the trial judge in the circumstances of the individual case. Practice varies. There is no model and no template, just good practice learned by the example of others, thought, and preparation.³

Footnotes

¹ See Chapter 2

² C.f. Criminal Procedure Rules 1.1(1)

³ See Blackstone D17.21/44 for a summary of common directions

Discussion with the Advocates

Judgments of the Court of Appeal, Criminal Division, frequently express regret that the terms of a legal direction were not discussed in advance of speeches between the trial judge and the advocates. This is because experience shows that, in the absence of discussion, necessary directions can be overlooked or unhappily framed. Discussions should take place routinely. If they serve no wider purpose, they will at least concentrate minds on the issues in the case.

1. Legal Directions – the essential introduction

A short explanation about the structure the judge proposes to adopt, the breaks he intends to take, and the likely length of the summing up will prepare the jury for what is to come.⁴

Some judges introduce their summing up with a summary of the general factual background founded upon the undisputed evidence, ending with a statement of the principal issue or issues between the prosecution and the defence which the jury is being asked to resolve.

The judge will explain the separation of his role from that of the jury.⁵ It may already have been explained at the outset of the trial and, if so, in a short case there will be no need to repeat it in full, provided that reference is made to the explanation already given. It is important, however, that jurors are directed or reminded in the summing up that they must reach their own conclusions on the evidence. Therefore, (1) while the judge will summarise the evidence, they must reach their conclusions on all the evidence, whether the judge has specifically mentioned it or not; and (2) while the judge may (or will) comment upon the evidence, it is their assessment of the evidence which must determine those conclusions.

Other directions usually given early in the summing up include the burden and standard of proof, the scope and structure of the indictment, the need to examine the evidence relating to each defendant on each count separately, and alternative verdicts.

Directions as to unanimous verdicts and the need for a foreman of the jury can be given whenever the judge thinks appropriate, usually just before the jury retires.

2. Legal Directions – the elements of the offence and the defence

All legal directions concerning the offence charged have a factual context. The jury does not require a dissertation on the law.⁶ What the jury needs is a statement of that which the prosecution must prove in the context of the facts of the case. Where there is no issue that someone committed the offence charged,⁷ and the issue is whether it was the defendant who committed it, there may be no need to embark on a detailed definition of the offence, especially if the elements required to prove the defendant's guilt are properly identified in a Route to Verdict.

The defence should be fully and fairly summarised.

Footnotes

⁴ There are usually local arrangements which can be made to accommodate smokers during breaks. If there are none, or none which can be made without compromising security, the jury should be forewarned so that smokers can if they wish consider the use of substitutes.

⁵ See Chapter 4

⁶ *Lawrence* [1982] AC 510 (HL), Lord Hailsham at page 519

⁷ If there is doubt it should be resolved in discussion with the defence advocate at the close of the evidence

It will assist the jury if the judge explains that some of his directions of law will concern the elements of the offence which the prosecution must prove, while others will concern their proper approach to the evidence. The scope for confusion will be reduced if the jury are told in advance when the judge is dealing with a matter of law concerning the offence, when he is dealing with a matter of law concerning their consideration of the evidence, and when he is summarising the evidence itself.

Written Route to Verdict and Written Directions of Law

Where the case is complex the judge should consider whether there is likely to be advantage in providing the jury with a written Route (or Steps) to Verdict, which is no more than a logical sequence of questions, couched in words which address the essential legal issues, to be answered by the jury in order to arrive at their verdict(s). Occasionally, a judge may also wish to consider providing a written legal definition for the jury's use. There are several examples in the Benchbook.

In *Green*⁹ Kennedy LJ gave valuable advice on the subject:

"26. This was not an easy case to sum-up, and no complaint has been made to us about the summing-up, but there was a lot of law for the jury to remember, and the evidence was not easy to distil. Legal directions had to be given, and were given correctly in relation to murder, manslaughter, robbery, joint enterprise, self-defence, lies, the rule against hearsay and a dying declaration, and good character, but nothing was reduced to writing in the form of a series of questions or a note which the jury could take with them. In a case of this complexity, and in particular in a situation where it was known in advance that the deliberations would be interrupted, we consider that to be regrettable. The questions asked by the jury, to which we will come in a moment, show how valuable a written aide-memoir might have been. It is also worth remembering that the preparation of an aide-memoir does tend to result in both counsel and the judge considering with some care how best and in what order to tackle the legal and factual issues in the light of the evidence as it has emerged."

Whether the case demands any written assistance is for the judge to decide. Some judges, in complex or lengthy cases, provide the jury with a written Route to Verdict or with written Directions of Law, or both. If the judge does intend to provide a Route to Verdict or written Directions of Law to the jury, the document should, if circumstances allow, be shown to the advocates in advance of speeches and in any event before the summing up, so that they can comment and suggest amendments if they wish. The writer has, on several occasions, been much assisted by the advocates in the preparation and amendment of a Route to Verdict but the suggestions do not, of course, have to be accepted if the judge disagrees with them. Written directions of law should be an integral part of the summing up which the judge and the jury read together. A Route to Verdict should be read together at a suitable point following the judge's explanation of the elements of the offence and/or defence, or just before the jury retires.

If the Route to Verdict or written directions do not encapsulate every word of the judge's legal directions, as they almost certainly will not (they will not, for example, include any directions concerning the separation of roles and the jury's proper approach to evidence), the jury should be informed that the document is not intended to be a replacement for, but an addition to, the legal directions given orally.

Footnotes

⁹ [2005] EWCA Crim 2513

3. Legal Directions – fair evaluation of the evidence – discussion with counsel

Legal directions concerning the evidence may now occupy a greater part of the summing up than directions concerning the offence, and many are just as important. The purpose of these directions is usually to help the jury to see the evidence in its appropriate perspective, or to counsel the jury against using the evidence in an inappropriate way.

Discussion with the advocates at the close of the evidence, as to the need for such directions, and, if necessary, the terms in which the direction will be given, is desirable. Since the judge will need to refer to at least some of the arguments for each party, discussion provides an opportunity for the judge to discover how the advocates intend to approach these issues with the jury. Assistance from the judge may also enable the advocates to focus on the material issues.

It is not always a straightforward decision at what point in the summing up to deliver legal directions as to the evidence, whether in a compartment of their own immediately following legal directions concerning the offence(s), or at a suitable moment immediately before summarising the relevant part of the evidence, or a combination of both. If it is convenient to devote a single section in the summing up to all or some of the legal directions concerning the evidence, as it often will be when there are multiple issues or defendants to whom they apply, it will be helpful to the jury to deliver a reminder of those earlier directions by placing them within their evidential context during the summary of the evidence.

Directions of law upon the permissible approach to evidence may affect the case of one defendant in a different or more nuanced way than in the case of another, and the judge should be careful to ensure that his directions cater for the circumstances of each defendant affected by the direction.¹⁰

4. The Evidence Relevant to the Issues Identified

How to organise a summary of the evidence is a matter for individual judgement based upon the nature of the evidence and the issues in the case. Almost never will it be helpful or appropriate simply to summarise each witness in turn.

In *Green*¹¹ Kennedy LJ went on to observe:

“27. Furthermore in presenting the evidence it is often helpful, in a case like this, to present it, as we have attempted to present it, in chapters, arranged in chronological order, each chapter drawing together all of the evidence in relation to a particular aspect of the history before moving on. Our presentation is incomplete because for present purposes we have not, for example, found it necessary to refer in detail to the expert evidence in relation to mobile telephone calls, or to the contents of the interview records, but at the appropriate stages in the narrative the jury could have been referred to that evidence, which they had before them in writing. The straightforward witness by witness presentation used in this case meant that the jury never had drawn together, with the authority of the judge, the contrasting evidence from the lay witnesses and the police officers and the defendants in relation to, for example, the telephone calls made by Claire Gibson to Scott after the stabbing. That we regard as regrettable.”

Footnotes

¹⁰ See *Miah and Others* [2009] EWCA Crim 2368 per Hughes LJ at paras 41-50

¹¹ [2005] EWCA Crim 2513

Depending upon the nature of the evidence, the number of defendants and the issues arising between the prosecution and the defence, there are different ways of organising the summary which include:

1. Count by count, defendant by defendant;
2. Chronologically, chapter by chapter (as suggested in *Green*);
3. Issue by issue;
4. In groups of witnesses, lay, expert and police, or
5. A mixture of some or all of the above.

The object, in every case, will be to present the evidence in a manner which is likely best to assist the jury to do justice to the parties.¹²

In a case with several chapters (e.g. a circumstantial evidence case) it may be helpful to provide the jury with a written structure of the summary of evidence which the judge proposes to adopt. In this way the jury will be able to see each chapter in the context of the whole.

What should a summary of the evidence contain?

Brevity is a virtue, provided that essential matters are not thereby omitted.¹³ Essential matters are those which bear directly on the issues the jury has to determine. The judge is not obliged to repeat every byway taken by the evidence, but is entitled to assess what is important and what is peripheral. Provided that the jury is directed to consider all the evidence, they will know that the judge is not, by omission, imparting a message that there is evidence which they can safely ignore. If the judge chooses to be selective, it is best for him to tell the jury that is what he is doing; that the judgement what is important evidence and what is not is for the jury to make; that if they wish to be reminded of the evidence, whether the judge has mentioned it or not, they should send a note and he will call them back to court.

The jury's task may include an assessment of the veracity, reliability or accuracy of a critical witness. Accordingly, evidence relevant to that assessment should be regarded as essential (e.g. interest to serve, hostile witness, inconsistent statements, evidence contradicted by others).

In almost every trial there is a stratum of agreed fact which will form the backdrop to the issues the jury have to determine. Those accepted facts need not be attributed to specific witnesses and need not be repeated just because they are referred to by more than one witness. Much of the evidence can be summarised in a narrative third person form. However, on the *critical issues* it may be possible, if the accuracy and completeness of the judicial note permits, to give a verbatim, first person, account of the witness' evidence, whether in chief, in cross examination, or in re-examination. If so, it is likely to assist.

When and how to deal with defence evidence

If the judge has crafted his summary of the evidence into categories or chapters, he is perfectly entitled to adopt the same approach with the evidence of the defendant and his witnesses. It is not essential to summarise the defendant's evidence in a space reserved to itself, although if the defendant's evidence is divided up in this way, the judge should ensure that nothing important has been inadvertently omitted, and the writer's practice is, at some stage, to provide a bare summary of the whole so that the jury has a composite picture of the defendant's case.

Footnotes

¹² See the observations of Rafferty J in *R v. C* [2009] EWCA Crim 2376 at §29

¹³ *Kumar* [2005] EWCA Crim 1979, per Laws LJ at §21 and 38

When the defendant has elected not to give evidence but relies upon explanations given in interview, the judge will need to deal with the status of the interview and to remind the jury of the salient parts of it.¹⁴

Expert evidence

Expert evidence requires special preparation and care. Usually, the results of examination, inspection or test are not in dispute, but the conclusions to be drawn from the results certainly are. If those conclusions are based upon opinions expressed by the expert the jury will need to evaluate their quality. That may be possible only by critical analysis of the expert's reasoning, an analysis which requires an understanding of the process in which the expert was engaged. It is therefore of some importance to the judge's ability helpfully to sum up the evidence that the expert has been required *in evidence* to explain that process in terms which are comprehensible and jargon-free.¹⁵ Without care, expert evidence can be overvalued or its limitations misunderstood. The trial judge has a responsibility both to present the expert evidence in terms which will assist the jury to an understanding and to expose any limitations in its effect. He is perfectly entitled to intervene during the evidence to seek explanations with a view to assisting the jury in his summing up. It makes sense to deal with competing expert evidence by category. Only in this way can the jury sensibly follow and resolve any dispute between experts.

Delivery

The best speeches to the jury from the advocates are those which do not waste words and concentrate on the real issues. The same applies to a summing up. By the time the jury listens to the summing up they will have heard two or more speeches already. Advance preparation to deliver the summing up within a comprehensible structure explained to the jury at the outset will bring clarity and avoid unnecessary repetition. Comfortable attention span varies widely between individuals. When the summing up is likely to take longer than an hour or so, planned breaks at suitable intervals will enable jurors to relax their concentration and re-focus on their return to court. The more organised into subjects and chapters the summing up is the better the jury will be able follow and appreciate its structure and content.

Jurors pay close attention to what the judge says. They will feel connected and reassured by eye contact from the judge when he is summing up even if the other eye is on a computer screen or notebook.

Balance

A one-sided summing up is not likely to be a fair summing up. The judge is not required to ignore the fact, if it is the fact, that the defendant's case appears to be at odds with the prevailing evidence, but it is not his job to support or appear to support the prosecution at the expense of fair and independent consideration of the evidence by the jury.

Footnotes

¹⁴ See Chapter 15 (8) Defendant's Silence at Trial

¹⁵ Note the request made by Thomas LJ to the parties in *Reed, Reed and Garmson* [2009] EWCA Crim 2698 at para 28 to provide the Court of Appeal with an agreed 'Primer' on DNA analysis, and the opportunity provided at the PCMH in cases involving technically difficult scientific evidence (see also paras 128-134) to require such assistance.

5. Representations from the Parties

Practice varies between judges whether to invite submissions from the parties at the end of the summing up. Sir Paul Kennedy, who when a Lord Justice of Appeal addressed newly appointed Recorders for the JSB on the business of summing up, did not invite submissions but considered them if made. The writer's preference is to ask the advocates immediately after the jury retire whether there has been any significant error in or omission from the summing up for which they seek correction. The object is to give the advocates a specific opportunity which, in the absence of invitation, they may later regret not seeking of their own initiative. If the summing up continues beyond an overnight adjournment the same opportunity can be given at the end of each day, if not each session.

6. Questions from the Jury

If, following retirement, the jury sends a note seeking elucidation of a direction of law, the note should be showed to the advocates and their response should be sought. It is desirable that the direction should be repeated in the same terms as those in which it was originally given, provided, of course, that the trial judge remains satisfied that it was accurate and comprehensible. If further explanation is required it is better given after repetition of the earlier direction and should be crafted so as to minimise the danger of confusion.

Should the judge receive a note disclosing a division of opinion between members of the jury, it should not be disclosed to the advocates, but may form the basis of a judgement whether a majority verdict, or, very exceptionally, a *Watson* direction should be given, or the jury discharged.

If the jury seeks a reminder of evidence, the ambit of the request should be ascertained and, if necessary, the assistance of the advocates sought to ensure that the note of evidence is the best available.

7. Summing Up Checklist

Former editions of the Benchbook contained a helpful checklist of usual and common legal directions. We hope that the Contents pages above will perform the same function.

10. Jury Management

In a work which is devoted to summing up it has not been possible to cover all aspects of jury management which will confront judges. However, HH Judge Inigo Bing has written a valuable practical guide to the role and management of the jury, *Law and Practice Relating to the Jury in Criminal Trials*, recently posted in the Criminal e-library on the JSB Training Website.

CHAPTER 2: INTRODUCTORY WORDS AT THE COMMENCEMENT OF TRIAL

For selection of and challenge to the jury see [Chapter 18 Jury Management](#).

The judge's first opportunity to introduce the jury to their task comes when the defendant has been put in their charge and before the prosecution opens its case.

What is required is an explanation of the jury's responsibilities:

1. The jury will be asked to return a unanimous verdict. It is their collective view of the evidence which will alone determine their verdict. They should discuss the evidence only when all 12 jurors are present in the jury room.
2. For the same reason, jurors should not discuss the case with anyone, not least family and friends whose views they trust, when they are away from court, either face to face, or over the telephone, or over the internet via chat lines or, for example, Facebook or MySpace. If they were to do so they would risk disclosing information which is confidential to the jury. Each juror owes a duty of confidentiality to the others, to the parties and to the court. Furthermore, if they were to discuss the case with others they would risk, consciously or not, bringing someone else's views to their consideration of the evidence. If anyone should persist in trying to engage a juror in conversation about the case the matter should be reported as soon as possible to the judge.
3. If the case is one which has in the past or may during the trial attract media attention, the jury should remember that the report is only the author's version of past events. It is the jury alone which hears the evidence upon which they must reach their verdict. They should therefore take care to ensure that they do not allow such second-hand reporting or comment to influence their approach to the evidence.
4. We have a system of open justice in which the parties themselves decide what evidence to adduce at trial. It is upon that evidence alone that the jury must reach their verdict. They should not seek further information about, or relevant to, the case from any source outside court, including the internet (e.g. Google). If they were to do so it would be unfair to the prosecution and the defence because neither would be aware of the research and its results and, therefore, would be unable to respond to it.
5. Should any juror have concerns, at any time during the trial, including during their retirement, about any aspect of his or her jury service which are sufficiently important to draw to the judge's attention, the juror should send a note to the judge via their usher or bailiff as soon as possible. Concerns communicated after the trial is over are expressed too late for the judge to assist.

The jury should be told that these directions apply throughout the trial and at each adjournment, even though they may not be repeated. There are several other matters which the judge can usefully cover in his introductory remarks. Some may be required by the circumstances of the case:

6. Where the judge has authorised security arrangements for the jury, they will need an explanation. The jury should be told that the arrangements made are not unusual and have no bearing upon their consideration of the case.
7. The jury should not visit the scene of the alleged offence (except on a view arranged by the court).

8. See Chapter 4 (6) Trial in the Absence of the Defendant and (7) Trial of One Defendant in the Absence of Another

Others will depend upon the preference or discretion of the judge, for example:

9. An explanation of the hours of sitting, stages and likely progress of the trial.
10. The estimated length of the trial.
11. A comparison between the responsibility of the judge for the law and the fairness and good order of the trial, and of the jury for all judgements upon the evidence.
12. The judge will consider applications relating to legal matters in the absence of the jury, preferably at a convenient time which does not interfere with the progress of the evidence before the jury.
13. The need to postpone final judgement on the evidence until the evidence is complete.
14. The ability to seek further information by a note to the judge.
15. While the jury can make notes if they wish, the judge will be keeping a note in order to summarise the evidence in summing up.
16. The judge's intention to provide comfort breaks morning and afternoon. A juror's ability to request a break if needed.
17. Arrangements, if any, to enable smokers to smoke during a break. If none is possible, for example where the jury is kept together for security reasons, advice on alternative measures, such as nicotine based substitutes.¹⁶

Sources:

O'Connor and Mirza [2004] UKHL 2 at paras 125 and 126

Consolidated Criminal Practice Direction para IV.42, see Chapter 18 Jury Management (1) Empanelling the Jury

Marshall [2007] EWCA Crim 35

Prime [1973] 57 Cr App R 632

Davis [2001] 1 Cr App R 115

Karakaya [2005] EWCA Crim 346

Comerford [1998] 1 WLR 191, [1998] 1 Cr App R 235

Thakrar [2008] EWCA Crim 2359

Archbold 4-254; 4-264a-265; Blackstone D13.18, Appendix 5

Footnotes

¹⁶ Although these topics for explanation, 9 – 17, are listed as discretionary, they all concern the jury's understanding of the process of trial, their role in it and the arrangements which can be made for their comfort and, for that reason, may be regarded as important.

CHAPTER 3: FITNESS TO PLEAD AND STAND TRIAL

Introduction

It is for the judge to decide whether the defendant is fit to plead and stand his trial under section 4(5) Criminal Procedure (Insanity) Act 1964 as substituted by the Domestic Violence, Crime and Victims Act 2004. Where a finding of unfitness is made, section 4A(2) of the 1964 Act requires the trial of an issue by a (or the) jury “whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence”.

Directions

- The judge should explain to the jury how the issue arises for their consideration and what the prosecution needs to prove so that they are sure¹⁷ before such a finding can be made. If it is not proved the jury must return a verdict of not guilty.
- The summing up of the evidence will be conventional save that the jury will be concerned only with the act or omission and not with the defendant’s state of mind.¹⁸
- It is likely that in view of the defendant’s incapacity the jury will not have the benefit of the defendant’s evidence. There may be other sources of evidence, helpful to the defendant, to which attention should be drawn (e.g. hearsay, interviews).

Joint Trials

In *B and Others*¹⁹ the Court of Appeal directed, during an interlocutory appeal from a preliminary hearing, that the issue of commission of acts by the unfit D1 and the issues of guilt of D2, D4 and D5 should be decided by the same jury in one trial, where each defendant was alleged to have been concerned in a ring of child abuse and D1 was said to have been the central figure.

In such a case the trial judge will need to be particularly careful that the jury understands the difference between the issues arising in the case of each defendant. Furthermore, the judge will need to identify any disadvantage to an unfit defendant caused by his inability to participate in the trial (e.g. where the defence of other defendants is cut throat) while preserving the entitlement of other defendants to a full consideration of their evidence, or, any disadvantage to a fit defendant from the absence from the witness box of the unfit defendant. Careful consideration of submissions made by counsel before the summing up will be required.

Footnotes

¹⁷ The proceedings and the burden and standard of proof are criminal: *Chal* [2008] 1 Cr App R 18, [2007] EWCA Crim 2647

¹⁸ *Antoine* [2001] 1 AC 340 <http://www.bailii.org/uk/cases/UKHL/2000/20.html>

¹⁹ [2008] EWCA Crim 1997

Sources

See the observations of Thomas LJ in Leslie Norman [2008] EWCA Crim 1810 upon the duties of the court when it becomes apparent that the defendant is unfit, and the commentary by Professor Ormerod in the JSB Online (criminal) e-letter for October and November 2008.

Archbold 4-166a/185; Blackstone D12.2/15.

CHAPTER 4: PRELIMINARY DIRECTIONS OF LAW

(1) Child Defendants

Introduction

Children aged 10 years or over but under the age of 14 years are now to be treated for the purposes of capacity to commit criminal offences in the same way as children aged 14 and over. Section 34 Crime and Disorder Act 1998 abolished the defence of *doli incapax* for those aged 10-13.²⁰

Nevertheless the age of a child over or under 14 years is likely to remain a relevant factor for the jury when considering offences requiring a specific intent or subjective recklessness (e.g. foresight of consequences), or a defence with a subjective element, or where age is a characteristic relevant to an assessment of reasonableness. (e.g. defences of provocation, duress, self defence).

Discussion with counsel will be required to identify relevance.

Directions

Where the young age of the defendant is a relevant consideration for the jury, the judge should identify the issue to which age is relevant together with its evidential context.

Sources

Archbold 1-91; 4-73; *Blackstone* A3.39

[Note CPS v P [2007] EWHC 946 (Admin) for considerations relevant to an application for stay based upon evidence of youth and incapacity.]

Footnotes

²⁰ ITB [2009] UKHL 20

(2) Separation of Roles

Introduction

The purpose of these preliminary remarks in the summing up is to ensure that the jury understands the difference between the responsibilities of the judge, the jury and advocates.

Directions

What is required is an explanation that:

- The judge will explain the law which the jury should apply and will make it clear when he is providing a direction of law. [That explanation will concern two forms of legal direction. The first concerns the elements of the offence charged and the matters the prosecution must prove. The second concerns the approach the jury should take to some aspects of the evidence.]
- The judge will summarise the evidence; the jury must decide all issues of fact. A summary, of necessity, involves selection. The jury must decide the case on all the evidence. Assessment of reliability, truthfulness, importance and weight of evidence is for the jury alone.
- While the judge may/will comment on the evidence (for example, in identifying the factual issues which the jury will need to resolve) the jury should not adopt any view they think the judge may have about the evidence unless, independently, they reach the same view.

Other directions/advice which may assist in a particular case include the following:

- The evidence is complete and it is not possible to hear more. The jury should not speculate about evidence which has not been given and they should decide the case on the evidence which they have seen and heard.
- The jury is not entitled to see the statements of witnesses (unless in special circumstances the statement has been exhibited and the judge decides they should take it with them to the jury room).
- Is there any room for mistake, or must one side or the other be lying?
- It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. The jury's task is to decide whether the prosecution has proved the elements of the offence charged.
- The advocates have made submissions to the jury as to what evidence they should accept and what conclusions they should reach. These are matters for the jury. Having considered the arguments on both sides they can accept or reject any one or more of them as they think right.
- The judge will be providing the jury with written directions of law/a Route to Verdict. Written directions are not a substitute for all the judge's legal directions in his summing up but they will contain.....The Route to Verdict is a sequence of questions posed in a logical and necessary sequence. The jury should approach each question in turn as directed. They should reach a decision on the first question before they turn to the next, and so on. If they do, they will have addressed all the elements of the offence and the defence raised necessary to reach their verdict.

- If the jury wishes to be reminded of any part of the evidence, whether the judge has mentioned it in his summary or not, the jury need only send him a request in a written note and he will call them back to court for the purpose.
- The nature of the evidence has been such as to excite feelings of anger or sympathy. When it comes to making judgements about the evidence and deciding upon their verdict the jury should put emotion aside and embrace a fair, careful and reasoned approach to the evidence.

(3) Burden and Standard of Proof

Directions

A direction concerning the burden and standard of proof is required in every summing up.

When the Legal Burden is on the Prosecution

The burden of proving the case rests upon the prosecution.

The defendant bears no burden of proving anything and it is not his task to prove his innocence.

The fact that a defendant has given evidence does not imply any burden upon him to prove his innocence. The jury will, however, need to reach a decision about what reliance they can place on the defendant's evidence. They should, when deciding upon the truth, reliability and accuracy of the evidence, adopt the same fair approach to every witness.

Standard of Proof

The prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty. Further explanation is unwise.²¹

If the jury are not sure they must find the defendant not guilty.

***Note:** Being sure is the same as entertaining no reasonable doubt. See Archbold 4-384/385; Blackstone F3.37-39, for a discussion of terms.*

When the Legal Burden is on the Defence

The burden of proving the matter in issue is on the defendant.

Standard of Proof

The defendant proves the matter in issue if the jury conclude, having considered all the relevant evidence, that the matter asserted is more probable (or more likely) than not.

***Note:** For the distinction between a legal and an evidential burden and the application of the Human Rights Act 1998 to issues of construction, see Archbold (2009) 4-381-383, 388, 389, 16-77, 78 and Blackstone F3.1/36.*

***Note:** Where an evidential burden is placed upon the defence (e.g. to raise sufficient evidence of self defence or duress for the issue to be left to the jury) and discharged, the legal burden remains on the prosecution to prove its case so that the jury is sure of guilt.*

Footnotes

²¹ Note the problems encountered in Majid [2009] EWCA Crim 2563 when the judge endeavoured to explain reasonable doubt to the jury

(4) Separate Consideration of Counts and/or Defendants

Introduction

Where there is more than one count in the indictment or more than one defendant is charged in the indictment and it is legally possible for the jury to reach mixed verdicts, a direction drawing attention to the need for separate consideration is required.

Direction

The jury must return separate verdicts upon each count and each defendant. In order to do so, the jury must decide whether the prosecution has proved its case on each count in respect of each defendant.

Note:

- (1) *The whole case may appear to turn upon the resolution of a single issue or upon the narrow assessment of a single witness. If so, the judge is entitled when giving this direction to recognise the common sense of the jury's task. Where the judge intends to point out that the counts appear to stand or fall together the advocates should be consulted first. Whenever it is legally possible for mixed verdicts to be returned the jury should be directed that it is for them to decide whether the counts do in fact stand or fall together.*
- (2) *The evidence on one count may be admissible in support of proof of another count. If so, it does not necessarily follow that the verdicts on both counts will be the same and the direction should still be given. (see Chapter 12 Cross Admissibility)*

See Archbold 7-70/72; Blackstone D25.22 for Inconsistent Verdicts

(5) Specimen Counts

Introduction

Specimen counts are included in the indictment in two circumstances:

- (1) Where the prosecution relies upon a course of conduct by the defendant, during which he commits several offences, but is unable to supply particulars of each offence, it may include in the indictment a 'specimen' count alleging a single offence committed on a single occasion falling between a span of dates when the course of conduct was taking place.
- (2) Where there is a multiplicity of alleged offences which the prosecution could separately charge if it wished, but choose not to in the interests of a manageable trial, it may select a lesser number of specific offences and charge them as 'specimens' or 'samples'.

Where, for example, a child complains of sexual abuse of the same type over a period of years but is unspecific about occasions, the prosecution may charge specimen offences reflecting the age of the child during each year in which the offences were committed.

Where, for example, a finance director, allegedly steals money from a company over a period of time, using the same method on different occasions, the prosecution may choose to charge specimen offences reflecting the method used throughout the period.

In both examples the effect of laying a specimen count is to invite the jury to conclude that the single offence of its type charged was committed during the period identified in that count. The prosecution is relying on evidence of a course of conduct (or system) to prove a single specimen offence.

The defendant must have sufficient particulars of the offence alleged against him to know the case he has to meet. Subject to rule 14.2(2) CPR, it is not permissible to charge more than one offence in the same count. If the prosecution relies on a specific incident as representative of a course of conduct the defendant is entitled to know which incident is relied upon. Particulars of the indictment may be required.

A defendant can be sentenced only for offences which he admits or of which he is found guilty by a jury (but see **Notes** below). The fact that a count is called 'specimen' does not on conviction enable the court to sentence for the several offences allegedly embraced by the specimen since they have not all been the subject of a verdict by the jury; only one of them has.²² Thus, it is necessary for the indictment to contain a sufficient number of specimen counts to reflect the criminality alleged. To achieve this, the prosecution may charge in respect of any one period more than one specimen offence. In the case of the alleged sexual offender, each further specimen may be distinguished by the addition of such words as "on a further occasion between.... and...." In the case of the alleged dishonest finance director, the prosecution will charge a greater number of specific offences describing them as specimens (or samples) taken from the course of conduct. A balance will need to be struck between overloading the indictment and adequately reflecting the criminality alleged.

Footnotes

²² Canavan [1998] 1 WLR 604, [1998] 1 Cr App R 79

It not infrequently happens in the prosecution of sexual offences against children that, in respect of one span of time, the prosecution identifies one or more specific offences and, in addition, relies on a continuing course of conduct. In such circumstances the jury will be required to consider, in respect of the same course of conduct, both specific and specimen allegations of criminality. It will be necessary for the judge to explain to the jury how the evidence relates to each category of charge.

This may require a Note to the Jury, for example:

“Count 1: Complainant aged 12, incident of indecent touching, occasion of holiday in Blackpool, in bedroom at B&B.

Count 2: Complainant aged 12, incident of indecent touching, in garden, occasion of visit to relatives in Manchester.

Count 3: Complainant aged 12, specimen count, incident of indecent touching, in bedroom at home in Leeds.

Count 4: Complainant aged 12, specimen count, at least one further incident of indecent touching, in bedroom at home in Leeds.

Count 5: Complainant aged 12, specimen count, an incident of causing masturbation, in living room at home in Leeds.

Count 6: Complainant aged 12, specimen count, at least one further incident of causing masturbation, in living room at home in Leeds.

Count 7: Complainant aged 13.....” and so on.

Directions

The judge’s directions to the jury should therefore:

- Explain why the specimen counts have been included in the indictment, i.e. either to make the trial more manageable or because the prosecution is unable to identify each separate occasion on which an offence was committed, or both; and
- Inform the jury whether and to what extent the course of conduct evidence is admissible to prove the specimen counts; and
- Explain that whether or not they accept the course of conduct evidence in its entirety, they must be sure that the offence charged as a specimen (or sample) count, or the further specimen (or sample) offence, which they are considering is proved.

Note 1

- (1) **Rule 14.2(2) Criminal Procedure Rules 2005 provides a new rule for the inclusion in one count of more than one offence committed during a course of conduct:**

Criminal Procedure Rules

"14.2 Form and content of indictment

- (2) More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission."

The Consolidated Practice Direction (Criminal Proceedings) IV.34.10-14 (amendment 2007) contains the following guidance on the use of the rule:

Consolidated Criminal Practice Direction

"Multiple offending: count charging more than one incident

(IV.34.10) Rule 14.2(2) of the Criminal Procedure Rules allows a single count to allege more than one incident of the commission of an offence in certain circumstances. Each incident must be of the same offence. The circumstances in which such a count may be appropriate include, but are not limited to, the following:

- (a) the victim on each occasion was the same, or there was no identifiable individual victim as, for example, in a case of the unlawful importation of controlled drugs or of money laundering;
- (b) the alleged incidents involved a marked degree of repetition in the method employed or in their location, or both;
- (c) the alleged incidents took place over a clearly defined period, typically (but not necessarily) no more than about a year;
- (d) in any event, the defence is such as to apply to every alleged incident without differentiation. Where what is in issue differs between different incidents, a single 'multiple incidents' count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.

(IV.34.11) Even in circumstances such as those set out in paragraph IV.34.8, there may be occasions on which a prosecutor chooses not to use such a count, in order to bring the case within section 75(3)(a) of the Proceeds of Crime Act 2002 (criminal lifestyle established by conviction of three or more offences in the same proceedings): for example, because section 75(2)(c) of that Act does not apply (criminal lifestyle established by an offence committed over a period of at least six months). Where the prosecutor proposes such a course it is unlikely that Part 1 of the Criminal Procedure Rules (the overriding objective) will require an indictment to contain a single 'multiple incidents' count in place of a larger number of counts, subject to the general principles set out in paragraph IV.34.3.

(IV.34.12) For some offences, particularly sexual offences, the penalty for the offence may have changed during the period over which the alleged incidents took place. In such a case, additional 'multiple incidents' counts should be used so that each count only alleges incidents to which the same maximum penalty applies.

(IV.34.13) In some cases, such as money laundering or theft, there will be documented evidence of individual incidents but the sheer number of these will make it desirable to cover them in a single count. Where the indictment contains a count alleging multiple incidents of the commission of such offences, and during the course of the trial it becomes clear that the jury may bring in a verdict in relation to a lesser amount than that alleged by the prosecution, it will normally be desirable to direct the jury that they should return a partial verdict with reference to that lesser amount.

(IV.34.14) In other cases, such as sexual or physical abuse, a complainant may be in a position only to give evidence of a series of similar incidents without being able to specify when or the precise circumstances in which they occurred. In these cases, a 'multiple incidents' count may be desirable. If on the other hand, the complainant is able to identify particular incidents of the offence by reference to a date or other specific event, but alleges that in addition there were other incidents which the complainant is unable to specify, then it may be desirable to include separate counts for the identified incidents and a 'multiple incidents' count or counts alleging that incidents of the same offence occurred 'many' times. Using a 'multiple incidents' count may be an appropriate alternative to using 'specimen' counts in some cases where repeated sexual or physical abuse is alleged. The choice of count will depend on the particular circumstances of the case and should be determined bearing in mind the implications for sentencing set out in *R v Canavan*; *R v Kidd*; *R v Shaw* [1998] 1 Cr App R 79."

In practice, a count charging multiple offences will be used only where the reality is that it is "all or nothing". Whenever the conduct complained of is different between incidents or the defendant has a different explanation to give, the use of a multiple offence count will serve to confuse rather than clarify.

For discussion see Archbold 1-139/144; Blackstone D11.32.

Note 2

The Domestic Violence, Crime and Victims Act 2004 (in force 8 January 2007), sections 17-20, makes provision for the trial of 'sample' counts by a jury and, following conviction, of the remainder by a judge – see Archbold 4-267h-k; Blackstone D13.72. The Consolidated Criminal Practice Direction (CP) IV.34.4-9 provides guidance as to the procedure to be adopted:

"Multiple offending: trial by jury and then by judge alone

(IV.34.4) Under sections 17 to 21 of the Domestic Violence, Crime and Victims Act 2004 the court may order that the trial of certain counts will be by jury in the usual way and, if the jury convicts, that other associated counts will be tried by judge alone. The use of this power is likely to be appropriate where justice cannot be done without charging a large number of separate offences and the allegations against the defendant appear to fall into distinct groups by reference to the identity of the victim, by reference to the dates of the offences, or by some other distinction in the nature of the offending conduct alleged.

(IV.34.5) In such a case it is essential to make clear from the outset the association asserted by the prosecutor between those counts to be tried by a jury and those counts which it is proposed should be tried by judge alone, if the jury convict on the former. A special form of indictment is prescribed for this purpose.

(IV.34.6) An order for such a trial may be made only at a preparatory hearing. It follows that where the prosecutor intends to invite the court to order such a trial it will normally be appropriate to proceed as follows. The draft indictment served under Criminal Procedure Rule 14.1(1) should be in the form appropriate to such a trial. It should be accompanied by an application under Criminal Procedure Rule 15.1 for a preparatory hearing. This will ensure that the defendant is aware at the earliest possible opportunity of what the prosecution propose and of the proposed association of counts in the indictment. It is undesirable for a draft indictment in the usual form to be served where the prosecutor expects to apply for a two stage trial and hence, of necessity, for permission to amend the indictment at a later stage in order that it may be in the special form.

(IV.34.7) On receipt of a draft two part indictment a Crown Court officer should sign it at the end of Part Two. At the start of the preparatory hearing the defendant should be arraigned on all counts in Part One of the indictment. Arraignment on Part Two need not take place until after there has been either a guilty plea to, or finding of guilt on, an associated count in Part One of the indictment.

(IV.34.8) If the prosecution application is successful, the prosecutor should prepare an abstract of the indictment, containing the counts from Part One only, for use in the jury trial. Preparation of such an abstract does not involve “amendment” of the indictment. It is akin to where a defendant pleads guilty to certain counts in an indictment and is put in the charge of the jury on the remaining counts only.

(IV.34.9) If the prosecution application for a two stage trial is unsuccessful, the prosecutor may apply to amend the indictment to remove from it any counts in Part Two which would make jury trial on the whole indictment impracticable and to revert to a standard form of indictment. It will be a matter for the court whether arraignment on outstanding counts takes place at the preparatory hearing, or at a future date.”

Sources

For the practice of specimen charges and the implications for sentencing see Archbold 1-131, 132; 5-68; Blackstone D11.33-35; D19.56-58.

(6) Trial in the Absence of The Defendant

Introduction

Exceptionally, a trial may proceed in the defendant's absence because he:

1. Misbehaves in court;
2. Is too ill to travel;
3. Voluntarily absents himself from his trial.

Misbehaviour²³

The judge will usually adjourn until the defendant has had time to reflect, and the trial will be resumed when he gives an assurance as to his future behaviour. If, for compelling reasons, the trial must continue, the defendant will usually return to court after time for reflection.²⁴

Illness²⁵

A defendant who is involuntarily unfit to attend trial is entitled to be present and the case should be adjourned until he is fit, or the jury discharged if that is not possible. If, however, the defendant consents, or the trial can proceed without prejudice to the defendant (e.g. in a multi-handed case, by calling evidence which does not affect the defendant), the trial judge has a discretion to proceed, but the discretion should be exercised sparingly.

Voluntary Absence

In *Hayward*²⁶ the Court of Appeal (Rose LJ, Vice-President) set out the principles to be followed:

"22. In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:

1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.
2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

Footnotes

²³ *Lee Kun* [1916] 1 KB 337 at page 341; [1916] 11 Cr App R 293 at page 300

²⁴ An accused should not be handcuffed in the dock unless there is a real risk of violence or escape and there is no alternative to visible restraint. If he is handcuffed the jury will require a specific direction that it is an irrelevant consideration which not be held against him (*Horden* [2009] EWCA Crim 388).

²⁵ *Howson* [1981] 74 Cr App R 172

²⁶ [2001] QB 862, [2001] EWCA Crim 168 at §22

3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
 - (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
 - (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;
 - (iii) the likely length of such an adjournment;
 - (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation *[see below]*;
 - (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;
 - (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
 - (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;
 - (viii) the seriousness of the offence, which affects defendant, victim and public *[see below]*;
 - (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
 - (x) the effect of delay on the memories of witnesses;
 - (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.
6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case." *[square bracketed italics added]*

These observations received the approval of the House of Lords in *Jones (Anthony)*²⁷ save that Lord Bingham qualified the Vice-President's references to the seriousness of the case and to the desirability of representation even where the defendant is voluntarily absent:

Footnotes

²⁷ *[2003] 1 AC 1, [2002] UKHL 5 at §§14-15*

“ 14. First, I do not think that “the seriousness of the offence, which affects defendant, victim and public”, listed in paragraph 22(5)(viii) as a matter relevant to the exercise of discretion, is a matter which should be considered. The judge’s overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor.

15. Secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight. For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances.”²⁸

Directions

- If the trial is to proceed in the defendant’s absence, that fact should be explained to the jury, as soon as possible, in appropriate terms. When the judge has ruled that the defendant has voluntarily absented himself he will not inform the jury of that fact and will need to warn the jury against:
 1. speculating upon the reason for the defendant’s absence;
 2. treating the defendant’s absence as any support for the prosecution case.²⁹
- These directions should be repeated during the summing up.
- Depending upon the stage of the trial at which the defendant has absented himself, the jury may also be told that as a matter of fact the defendant has given no evidence which is capable of contradicting the evidence given by witnesses for the prosecution.
- If, however, the defendant has absented himself before being given the warning under section 35 Criminal Justice and Public Order Act 1994 (inferences from silence at trial) no inference adverse to the defendant can be drawn from his failure to give evidence and the jury should be so directed. Only if the warning was given and the defendant made his election not to give evidence is an adverse inference available.

If the defendant gave an account in interview which was partly self serving it is admissible as to the truth of the matters stated (See also Confessions Chapter 15 The Defendant’s Statements and Behaviour, (1) Confessions).

Footnotes

²⁸ Mr Jones’ Art 6 application to the ECtHR was declared to be manifestly ill-founded (*Jones v UK Appn No 30900/02*). He had chosen to be absent from his trial and had not applied to advance evidence before the Court of Appeal whose hearing he attended.

²⁹ If, as in *O’Hare* [2006] EWCA Crim 471, the absent defendant’s legal team withdraw it will be necessary to inform the jury that the trial will proceed in their absence also. If they remain it may be necessary to explain their limited role, but the terms of any explanation should be discussed with the advocates first.

Illustration – defendant charged with offence of violence – defence is self defence - defendant absconds during trial – no election not to give evidence – defendant represented - partially self-serving interview

As I told you at the time the defendant was first absent from court, it occasionally happens that a jury is asked nonetheless to proceed to reach a verdict. I repeat what I then said, and it is important. You must not be tempted to speculate as to the reason for the defendant's absence. It is not relevant to your assessment of the evidence which you must judge with care. You should not treat the defendant's absence from court, and neither should you treat his absence from the witness box, as any support for the prosecution case. The fact of his absence does, of course, mean that there is no oral evidence from him which is capable of contradicting, or undermining, or explaining the evidence for the prosecution. Counsel for the defendant has tested the evidence by questions put to the witnesses and you will judge to what extent those questions elicited answers helpful to the defendant. The defendant gave an account in interview which formed the basis of those questions. He admitted using violence but said that he was acting in self defence. You will appreciate that his admission may be significant and weighty because it was made against the defendant's interests. He would hardly admit using violence unless it was true that he did. That is for you to judge. On the other hand, his claim to have been acting lawfully in self defence was not made on an occasion when he was giving evidence under oath and it has not been tested by questions from counsel for the prosecution. Nevertheless, the interview is evidence in the case and you should consider what the defendant then had to say with care. Please remember that the defendant was under no obligation to contribute to this trial or to prove anything in his defence. The burden remains upon the prosecution to prove its case so that you are sure.

Sources

Archbold 3-197/199a; Blackstone D14.80/87

(7) Trial of One Defendant in the Absence of Another

Introduction

A defendant named in the indictment may not be before the court because he has pleaded guilty or will be separately tried.

Sometimes, particularly by agreement between the parties, the fact of an absent defendant's plea of guilty, or conviction, will be admitted to 'de-mystify' the current proceedings, but it will be of no evidential significance unless relevant as below. If there is a contested application by the prosecution to admit the evidence other than under section 74 Police and Criminal Evidence Act 1984, its prejudicial effect is likely to be such that it should be excluded.

Evidence that a co-accused has pleaded guilty or been convicted on another occasion may be admissible in the current trial under section 74 Police and Criminal Evidence Act 1984, subject to the discretion to exclude under section 78.³⁰ Such evidence does not attract the bad character provisions of the Criminal Justice Act 2003 because it has to do with the offence charged against the defendant.³¹

Directions

- Where the fact of a plea of guilty by another person named in the indictment is not admitted in evidence, or he is to be separately tried, the jury should be told that they are not required to reach a verdict in his case and should not speculate. They should concentrate on the evidence in the case of the defendant they are considering.³²
- Where the guilt of another becomes known to the jury but it is inadmissible as evidence against the defendant, the jury should be explicitly directed to that effect.
- Where evidence of a conviction is admitted under section 74 PACE 1984 the jury must be told to what extent the evidence is relevant to their consideration of the defendant's case and, where there is a risk that the conviction may be used for wider purposes, they should be warned against it.

Footnotes

³⁰ For the exercise of the discretion see *Archbold* 9-89/90a; *Blackstone* F11.8/9

³¹ *Smith* [2007] EWCA Crim 2105 in which, however, the appeal was allowed on the ground that the admission of the evidence effectively closed out the defence

³² For the admission of evidence of an out of court statement by a third person for or against an accused see Chapter 15 Defendant's Statements and Behaviour (3) Out of Court Statements by Another Person as Evidence For or Against the Defendant

Illustration – admission of D2’s conviction for being concerned in the importation of controlled drugs – relevant in trial of D1 to a limited extent – warning against use for wider purpose

You have heard that on an earlier occasion D2 pleaded guilty to the offence of being concerned in the importation of a controlled drug of Class A contrary to section 170 Customs and Excise Management Act 1979. The prosecution case is that D1 was concerned in the same importation. However, the fact that D2 took part in the importation is not evidence that D1 is also guilty. D2’s conviction is only relevant to the extent that it proves that there was an illegal importation of the controlled drug and that D2 was involved in it. His conviction is sufficient to establish those facts but it is for you to decide whether they are proved. The prosecution seeks to prove D1’s involvement by circumstantial evidence of his movements, his meetings with D2 and others, and his communications with D2 at significant moments during the movement of the drug. It is upon that evidence which you must decide whether it is proved that D1 was involved in the importation.

Sources

Archbold 9-82/97; Blackstone F11.5/10

For the necessity for careful directions about the purpose for which evidence admitted under section 74 may be used see Kempster [1989] 1 WLR 1125; Boyson [1991] Crim LR 274; Mahmood [1997] 1 Cr App R 414, [1997] Crim LR 447

(8) Alternative Verdicts

Introduction

It is good practice in the majority of cases to include in the indictment a lesser count containing particulars of any alternative verdict offence the judge proposes to leave to the jury. Consideration will usually be given to adding an alternative verdict count before the jury is sworn. However, the need for a further count may not become apparent until the evidence is given. If so, a discussion with the advocates will be required at the close of the prosecution case, or at the close of all the evidence, to resolve the question. If the alternative is not laid in the indictment a written Route to Verdict setting out the jury's correct approach is desirable. Where an offence requiring specific intent is charged (e.g. section 18 Offences Against the Person Act 1861) and intent is in issue, the alternative (section 20) should be left to the jury.³³

Directions

Whenever an alternative verdict is to be left to the jury an explanation is required.

- **Where the alternative is laid in the indictment** The prosecution does not ask the jury to return a verdict of guilty on both count 1 (the more serious offence) and count 2 (the less serious offence) but upon one or the other. The jury should first consider count 1. If they are sure the offence is proved, their verdict will be guilty and they will not be asked for a verdict upon count 2. If they are not sure the offence is proved, their verdict upon count 1 will be not guilty and they should proceed to consider count 2.

Alternatively,

- **Where the alternative is not laid in the indictment** If the jury are sure that the prosecution has proved its case their verdict will be guilty. If, however, they are not sure, they should proceed to consider the lesser alternative.

In either case it will be necessary to explain the essential ingredients of both the greater and the lesser offence, in particular the differences between them.

Sources

Archbold 4-453/456, 463; *Blackstone* D18.41/66

Note: For consideration of the issue when an alternative verdict should be left to the jury see Coutts [2006] UKHL 39; Foster [2007] EWCA Crim 2869; Hodson [2009] EWCA Crim 1590

Footnotes

³³ Hodson [2009] EWCA Crim 1590

(9) Delay

Introduction

1. A prolonged delay between the commission of the alleged offence and the complaint leading to trial is capable of affecting the quality of the evidence in two ways:
 - (1) The memory of witnesses fades with time;
 - (2) Lines of inquiry may have been closed, either because records have been lost or destroyed or because witnesses have died or can no longer be traced.
2. Delay by the complainant is likely to have been explored in the evidence. The defence may rely upon the passage of time in an attempt to undermine the reliability of the complaint (see Chapter 17 (2) Allegations of Historical Sexual Abuse). In addition, specific respects in which delay has permanently hampered preparation of the defence may be revealed. The longest delays are encountered in cases of alleged sexual offending. The trial judge may be invited to review the state of the evidence at the close of the prosecution case and to impose a stay.³⁴ This section concerns the judge's responsibility, once a decision has been made that the evidence is fit to be left to the jury, to confront the exigencies of delay in his summing up.
3. In *H (Henry)*³⁵ the Court of Appeal carried out a review of the authorities, as they concerned the judge's obligation to refer to delay in his directions, of which the following is part³⁶:

"Dutton [1994] Crim.L.R. 910. That case involved uncorroborated allegations spreading over a period of between 20 and 14 years prior to complaint made. In the interim a number of witnesses had died who could realistically have been expected to assist in relation to the defence which the defendant put forward. The decision of the judge to reject an application for a stay on the grounds of abuse of process was confirmed. However, the submission for the appellant that the judge was wrong not to refer in his summing-up to the age of the complaint and the difficulties which that lapse of time may well have occasioned the defence was accepted and the appeal was allowed on that ground. The Court stated:

"....Such directions would surely be called for in a case where not only had there been substantial delay but where it could be seen that witnesses who might have been able to give relevant evidence, and a large number of them, had disappeared during the interval and accordingly there was the clear possibility that the defence was not only prejudiced but seriously prejudiced as a result of not being able to produce that evidence ... There is ... a difference between the point being made by counsel and the submission which has been made by counsel being endorsed by the judge. It seems to us that this was a case in which it really was incumbent upon the learned judge, having taken the decision which he did at the outset of proceedings, ... to, at the end of the case, point out to the jury that what was said by the defence about the possible prejudice to the defence as a result of the delay was a matter to which they could, and should properly have regard.

If a judge is silent in relation to a topic such as that when it has been advanced and canvassed extensively by the defendant, then in a case such as this the very silence of the learned judge may tend to devalue

Footnotes

³⁴ See *Smolinski* [2004] 2 Cr App R 40, [2004] EWCA Crim 1270; *B* [2003] 2 Cr App R 13, [2003] EWCA Crim 319; *Mackreth (deceased)* [2009] EWCA Crim 1849

³⁵ [1998] 2 Cr App R 161; [1998] Crim LR 409

³⁶ At pages 164-168, per Potter LJ

what was in effect perhaps the most important point which could be advanced from an adversarial point of view on behalf of this appellant.”

.....*John E* [1996] 1 Cr.App.R. 88 . In this case the allegations related to events 17 to 23 years before the trial, the alleged offences only having given rise to complaint following a family disagreement....Specific prejudice was relied on. The appellant’s brothers, who were potential witnesses able to give the lie to or confirm certain incidents, had both died in the interim. Also a witness at trial had grave difficulty in remembering a particular highlighted incident in the light of the delay. Lord Taylor C.J., having noted the extreme delay of 20 years said:

“.....Bearing in mind all the circumstances of the allegations, the fact that there was a previous trial which was inconclusive and the total absence from the summing-up, in the present case, of any reference to difficulties which the defence may have had, we consider that this conviction cannot stand. **We are not saying that as a matter of law or as a matter of invariable practice whenever there had been some delay in the case coming to trial the judge must give a jury directions as to the difficulties in which the defence find themselves. Much must depend upon the length of the delay, the cogency of the evidence and the circumstances in the case.** We consider that in a case of this antiquity, with the evidence of the complainant wholly uncorroborated, it was appropriate of the judge to give a direction of the kind we have indicated. His failure to do so in the circumstances we consider was a misdirection. It is upon that basis that we allow the appeal.”

.....It is apparent....that, in cases of this kind, each will fall for consideration on its own particular facts and circumstances, to which the judge’s summing-up must be appropriate..... Comparison of the various decisions also suggests that it will be unusual for a conviction to be regarded as safe in a case where there has been no direction on difficulties which the defence contend have arisen from the delay in the making of the complaints and the bringing of the cases to trial. It is ultimately nonetheless a matter for this Court to decide whether the conviction is safe in the light of the length of the delay, the cogency of the evidence and all the circumstances of the case. To that extent, comparison with the facts in other cases is unlikely to be decisive in deciding whether or not the absence of a direction on delay is fatal to the conviction.....

We consider it is plain upon the state of the authorities to which we have referred that it is desirable in cases of substantial delay that some direction should be given to the jury on possible difficulties with which the defence may have been faced as a result of such delay. Nonetheless, such a direction is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial. Equally, such a direction should be given in any case where it is necessary for the purposes of being even-handed as between complainant and defendant.” [bold emphasis added]

4. In *Percival*³⁷ the Court observed that, particularly when the case was founded upon a late complaint and oral testimony, prolonged delay (28 years in that case) must threaten the fairness of the proceedings and, before a conviction could be regarded as safe, the court would need to be satisfied that the judge had confronted the jury with the delay and:
 - (1) its impact on the preparation and conduct of the defence;
 - (2) the prosecution’s discharge of the burden and standard of proof.

Footnotes

³⁷ *The Times*, July 20 1998

It was not appropriate to diminish the impact of delay on the fairness of the trial by implying only that that there were disadvantages to both sides; nor was it enough simply to recite the arguments of counsel and allow the jury to decide which to prefer.

5. In *M (Brian)*³⁸ the Vice President, Rose LJ, re-iterated that the terms of the direction must depend upon the particular circumstances of the case:

“It is to be noted that, in *Percival*, the Court quashed the appellant’s convictions because of deficiencies in the summing-up in relation to delay and character. In relation to delay the Court said, first, that the summing-up had wrongly equated the problems confronting prosecution and defence without stressing the need for “conscientious concern for the burden and standard of proof”; secondly, the judge had failed to put his imprimatur on the submissions of counsel; and thirdly, though less significantly, the judge had failed to put over the point about delay when reviewing the evidence of a particular witness. The direction as to character was “unacceptably terse”. It is apparent that the judgment in *Percival* was directed to the summing-up in that particular case. **We find in the *[Percival]* judgment no attempt by the Court to lay down principles of general application in relation to how judges should sum up in cases of delay and we accordingly would wish to discourage the attempts being made, with apparently increasing frequency, in applications and appeals to this Court, to rely on *Percival* as affording some sort of blueprint for summings-up in cases of delay. It affords no such blueprint. Indeed in this area, as in so many others, prescription by this Court as to the precise terms of a summing-up is best avoided. Trial judges should tailor their directions to the circumstances of the particular case. In a case where there have been many years of delay between the alleged offences and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard of proof can be left to the good sense of trial judges with appropriate help and guidance from the Judicial Studies Board. In some cases, however, such a warning may be unnecessary and its absence, where the evidence is cogent, will not necessarily render a conviction unsafe, particularly when counsel’s submissions at trial have not highlighted any specific risk of prejudice...**” [bold emphasis added]

6. In *E (T)*³⁹ the Court of Appeal gave a reminder of the need for specific directions. Keith J, delivering the judgment of the court, said⁴⁰:

“.....while juries continue to decide questions of guilt, we must have confidence that they will make allowances for the difficulties faced by a defendant who can only say “I didn’t do it”, as well as delay.”

Footnotes

³⁸ [2000] 1 Cr App R 49; [1999] Crim LR 922

³⁹ [2004] 2 Crim App R 36, [2004] EWCA Crim 1441

⁴⁰ §17

Directions

- The judge should refer to the fact that the passage of time is bound to affect memory. A witness' inability to recall detail applies equally to prosecution and defence witnesses but it is the prosecution which bears the burden of proof. The jury may be troubled by the absence of circumstantial detail which, but for the delay, they would expect to be available. Conversely, the jury may be troubled by the witness' claim to recall a degree of detail which is unlikely after such a prolonged passage of time.⁴¹ Whether reference should be made to such possibilities is a matter for the trial judge to assess having regard to the evidence and the issues which have arisen in the case.
- If, as a result of delay, specific lines of inquiry have been closed to the defendant the disadvantage this presents should be identified and explained by reference to the burden of proof.
- A defendant of good character will be able to assert that the absence of any further and similar allegation is significant.
- Directions must make clear that the jury *should* give careful consideration to the exigencies of delay.

Illustration – delay of many years – memories fade – problems for the defendant in answering the prosecution case – no repetition of the offending

The complainant was describing events which took place a long time ago. If you do conclude that she has given a satisfactory explanation why no complaint was made to the police until after her marriage, there remain some consequences of the delay which you need to bear in mind.

First, memories fade. You would not expect a witness' memory of detail to survive intact after this length of time. For example, the complainant told you.....

But, if a witness does claim to have a memory of detail there may be a risk that its accuracy has been affected by the passage of time. We all have experience of distant memory playing tricks with us. Although the complainant told you that she had a vague recollection about....., she said that she had no difficulty recalling the details of.....

You must decide whether the complainant's recollection of the essential events is reliable. If, therefore, you are concerned, either about the absence of a circumstantial detail which would have assisted you to judge the reliability of her evidence, or by her claim to remember detail which you regard as unlikely after this length of time, then that is a legitimate concern, because it is relevant to the question whether the prosecution has proved its case. But, it is for you to decide whether your concern affects only a small part of the complainant's evidence or undermines her evidence as a whole. If, of course, there is other evidence which tends to support the complainant's recollection of detail about a particular incident you would be able to give effect to it if you thought it right to do so. The complainant's older sister has given evidence that on the complainant's 14th birthday the complainant told her that the defendant had, the night before, visited her bedroom and touched her inside her pyjamas "in a private place". Provided you are sure that the sister was recalling

Footnotes

⁴¹ See, for example, the concerns of the Court of Appeal, where the evidence of one complainant was capable of supporting others about events 37 years before trial, in *Joyson* [2008] EWCA Crim 604

accurately something she was told at the time and has not been influenced by anything she has heard since, her evidence is capable of supporting the complainant's evidence recalling the incident itself. I say it is capable of providing support. You must decide whether it does or not. The sister's evidence was not independent of the complainant because the complainant is the source of the complaint, but the fact the complaint was first made 10 years ago is relevant to the question whether the complainant's present claim to recall the incident is reliable. There is no other respect in which the complainant's evidence is capable of being supported in this way.

Second, you should consider the effect which the passage of time has had upon the defendant's ability to respond. He did not know, until recently, that he would have to meet the case now brought against him. He is in no better position than anyone else to remember the details of his family life 10-15 years ago. To give an example, had the allegation been made at the time, the defendant might have been able to recall details of his movements which assisted his defence. That kind of inquiry is no longer available to him. Counsel has drawn to your attention two specific respects in which the defendant has been disadvantaged.....The prosecution responds.....

If, having considered the defendant's position, you accept that he has, as a result of the delay, been placed at a material disadvantage, you should consider carefully to what extent that concern might influence your conclusion.

There is one effect of delay which you may regard as supportive of the defendant's case. The defendant is now in middle age. At the time of these events, and since, the defendant has had access to several other children within the family environment. Yet, it is not suggested that he has behaved improperly with them on any other occasion.

You should bear all these factors in mind when you are deciding whether the evidence makes you sure of the defendant's guilt. You should make your own assessment and decide what weight you should attach to them.

Sources

Archbold 4-66/72, 403a; Blackstone D3.58/62

CHAPTER 5: THE PROSECUTION CASE AND PRINCIPLES OF CRIMINAL LIABILITY

(1) Circumstantial Evidence

Introduction

Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence; it is in this category that most controversy is generated and specific directions will be required.

A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence. The prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence, and motive.

At the conclusion of the prosecution case the question for the judge is whether, looked at critically and in the round, the jury could safely convict.⁴² The question for the jury is whether the facts as they find them to be drive them to the conclusion, so that they are sure, that the defendant is guilty.⁴³

Directions

The following is an extract from the speech of Lord Morris of Borth-y-Gest in *McGreevy v. DPP* on the subject of summing up in a circumstantial case:

“The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a Judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the Judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt.”

Footnotes

⁴² *P(M)* [2008] Cr App R 6; [2007] EWCA Crim 3216

⁴³ *McGreevy v. DPP* [1973] 1 WLR 276, HL; [1973] 57 Cr App R 424

- A circumstantial case requires judicial scrutiny and care. It is frequently the case that circumstances, proved or admitted, are of equivocal effect in the absence of a clinching or explanatory piece of evidence. In such cases the judge should assist the jury to identify the evidence of circumstances upon which the cogency of the prosecution case depends.
- Where the accuracy or the truth of evidence is in dispute, the jury may be able to derive assistance from other evidence in resolving that dispute (e.g. consistent accounts by different witnesses). Where, however, the accuracy or truth of evidence standing alone is in dispute (e.g. the quality of identification evidence), consideration of other, unrelated, evidence may or may not assist. If it does not assist, the jury should reach a conclusion on the disputed evidence without regard to any other category of evidence. If they reject the evidence it can form no part of the 'circumstances' to be assessed.
- Where the question is not whether the evidence is accurate or true, but whether the evidence supports an inference of guilt or innocence, the circumstances should be considered in the round, since the final question, whether the jury is sure of guilt, can only be answered by assessment of the effect of all the evidence.⁴⁴
- An interpretation of the significance of proved or admitted facts is frequently required. One of the possible dangers is an invitation to the jury by the prosecution or the defence to rely upon a single alleged fact to support the heaping of inference upon inference, or to 'fit' the evidence to the theory being advanced without sufficient regard to the cogency of the inference. Where the risk exists a warning may well be required.
- Directions should include:
 - (1) an explanation of the nature and elements of the circumstantial case;
 - (2) a summary of the evidence in support of that case;
 - (3) a direction that the jury must decide what evidence they are sure they accept;
 - (4) a summary of the defence case as to the disputed evidence, the identification of evidence which may rebut the inference of guilt, and the disputed inferences;
 - (5) an explanation that speculation, or attempting to fit the evidence to a particular theory (by either side), is not the same as drawing an inference from reliable evidence; and
 - (6) a direction that the final question for the jury is whether the evidence they accept leads them to the conclusion, so that they are sure, that the defendant is guilty.

Footnotes

⁴⁴ *Hillier* [2007] 233 ALR 634 (HC Australia); Criminal Law Week Issue 46 December 2007 (as *McGreevy*)

Illustration – explanation what is a circumstantial case – taking care – the categories of evidence which the jury must consider – the defence case – example of drawing inferences or reaching conclusions - beware of speculation – the ultimate decision

The prosecution has sought to prove a variety of facts by evidence from different sources. The prosecution submits that the effect of that evidence, when considered as a whole, is to lead to the inescapable conclusion that the defendant is guilty. In other words, the variety of facts proved cannot be explained as coincidence. Circumstantial evidence, as it is called, can be powerful evidence but it needs to be examined with care to make sure that it does have that effect.

The categories of evidence on which the prosecution relies are these...The prosecution places particular emphasis on....because....

The defence case is....

You should examine each category of evidence in turn and decide whether you accept it. Clearly, if you reject a significant part of the prosecution evidence that will affect how you approach your final conclusion.

In the course of their submissions to you the advocates on both sides suggested what inferences you should draw from particular parts of the evidence. Drawing an inference is simply the process by which you find, from evidence which you regard as reliable, that you are driven to a further conclusion of fact. You need to be careful to ensure that the evidence really does lead to the conclusion the prosecution invites you to reach.

[Let me give you an example of drawing inferences which does not arise on the facts of this case but which illustrates the need for care in judging whether the fact proved supports the inference of guilt: If my fingerprint is found in the living room of my neighbour's home, it is a sound inference that at some stage I have been in his living room. It would not, however, support an inference that I was the burglar who stole his DVD recorder from his living room. If you accepted my neighbour's evidence that I had never been invited into his home, then, in the absence of some acceptable explanation from me, you might infer that at some stage I had been in my neighbour's home uninvited. You may or may not be driven to the further conclusion that I was the burglar. But, if you also accept that there was found a second fingerprint of mine at the point of entry or, that in my shed there was found a DVD recorder which my neighbour recognises as the one stolen from his living room, you would, no doubt, conclude so that you were sure that I was the burglar. You will notice how the inference of guilt becomes more compelling depending upon the nature and number of the facts proved.]

What conclusions you reach from the evidence is entirely for you to decide. When you are considering what inferences you should draw, or what conclusions you should reach, it is important to remember that speculation is no part of that process. Drawing inferences and reaching conclusions are not the same as fitting the facts to a particular theory.

Having decided what evidence you accept, consider whether, looked at as a whole, it drives you to conclude, so that you are sure, that the defendant is guilty.

Sources

Archbold 10-3; Blackstone F1.16

(2) Conspiracy

Introduction

1. The essence of a criminal conspiracy is the agreement to commit the substantive offence or to defraud. It is an agreement between two or more conspirators. Negotiation or mere intention is not enough.⁴⁵
2. It may be necessary to analyse the evidence in order to identify whether what is revealed is one or more than one conspiracy.
3. A conspiracy may take the form of a 'chain' (A agrees with B who agrees with C) or a 'wheel' (X agrees with A, X agrees with B, X agrees with C), or a combination of the two. It is not necessary for each conspirator to have met or communicated with the others or even to know their identities, but it is necessary that each of the conspirators is party to the common design and is aware that the design involves a larger scheme involving others. In the 'wheel' conspiracy, with X at its hub, if A, B and C are unaware of their involvement in the larger scheme but only of their agreement with X, there are three separate conspiracies, not one. Even if they are aware that X is making separate agreements with A, B and C they are not conspirators with each other unless they are parties to the wider common design.⁴⁶
4. The conspiracy may be proved by inference from conduct, including words spoken in furtherance of the common design, or by direct evidence of the agreement.
5. Section 118 Criminal Justice Act 2003 preserves the common law rules admitting evidence of hearsay statements made in furtherance of a common enterprise, including a conspiracy. For directions in such cases see Chapter 14 Hearsay (4) Statements in Furtherance of a Common Enterprise.
6. When two alleged conspirators are defendants in the same trial there may be evidence admissible against one which is not admissible against the other. Thus, it will be open to the jury to convict one defendant and acquit the other. These are matters which should be considered before speeches and, if they arise, the observations of the advocates sought. The trial judge should evaluate the evidence against each defendant. In *Testouri*⁴⁷ Kennedy LJ had the following advice in a case of an alleged conspiracy to defraud:

"9. There is some support, on the face of it, to be found for the approach adopted by the learned judge in a decision of this Court in the case of *R v Ashton* [1992] Crim LR 667, of which we had an opportunity to read the transcript. In that case this Court came to the conclusion that the learned judge was wrong in directing the jury that it was a situation in which they must return the same verdict in relation to each of the co-accused. But in commenting upon that decision, in the Crim LR, Professor Sir John Smith said:

"If the evidence admissible against A proves that A and B conspired together, A may be convicted of conspiracy with B, even though B, his co-defendant, is acquitted because there is no sufficient evidence admissible against him. The usual case is that where A has made a confession which is evidence against him

Footnotes

⁴⁵ There are other preserved common law conspiracies – see Archbold 33-34; Blackstone A6.33; Smith & Hogan 12 ed. Para 13.3.4.2/3. As to qualified or conditional agreement see Archbold 33.6/7; Blackstone A6.40/41; Smith & Hogan 12 ed. Para 13.3.3.1, page 409

⁴⁶ Archbold 33-5/8, 33-52/57; Blackstone A6.43; Smith & Hogan 12th ed. Para 13.3, page 399

⁴⁷ [2004] 2 Cr App R 4, [2003] EWCA Crim 3735 at §10-11. See also *Longman and Cribben* [1981] 72 Cr App R 121; *Ashton* [1992] Crim LR 667 (CA); *Roberts* [1984] 78 Cr App R 41

but not against B. The present case, however, was not like that. The tape-recordings were not of admissions or confessions but of steps taken by the parties in pursuance of the alleged conspiracy and were equally admissible against both: *Blake and Tye* (1844) 6 QB 126. W was entitled to rely on A's evidence at the trial that he (A) never intended the murder to take place. The jury could not be satisfied that this evidence was untrue so far as W was concerned while finding that it was, or might be, true so far as A was concerned. It was the same evidence. The jury either believed it or they did not. If they believed it, neither defendant was guilty, if they disbelieved it, both were guilty. It is submitted that the trial judge's direction to the jury was correct."

10. where what is alleged is a conspiracy to defraud, in which only two defendants are alleged to have participated, the judge should ask himself two questions. First: whether there is evidence of conspiracy to defraud? That means there must be evidence of an agreement to achieve a criminal purpose. If there is no evidence of that because, for example, on one view of the evidence only one defendant can be shown to have been dishonest then, if that view of the evidence is taken, both defendants must be acquitted and the jury must be so directed. The authority for that proposition is to be found in *Yip Chieu-Chung v The Queen* [1995] 1 AC 111. Secondly: whether there is any evidence admissible against only one defendant? If that evidence is or could be critical, in that without it that defendant cannot be shown to have been a party to the conspiracy alleged, then it will be necessary to explain to the jury how they may reach the conclusion that although the case is proved against that defendant, it is not proved against the defendant in relation to whom the evidence may not be admissible. Where there is no such evidence the jury must be told that it is not open to them to return different verdicts in relation to two defendants. That, as it seems to us, is in practical terms what is meant by the authorities to which we have referred when they speak of evidence being of unequal weight."⁴⁸ [emphasis added]

Footnotes

⁴⁸ See also section 5(8) Criminal Law Act 1977: the acquittal of all other conspirators is not a ground for quashing the conviction of an appellant "unless under all the circumstances...his conviction is inconsistent with the acquittal" of the others, if, for example, the defence was common to all (*Shannon* [1975] AC 717; *Longman* [1980] 72 Cr App R 121; *Roberts* [1983] 78 Cr App R 41; *Elkins* [2005] EWCA Crim 2711)

Directions

- The nature of a statutory conspiracy can be explained in a few words.

Illustration – statutory conspiracy defined

A conspiracy is an agreement between two or more people to commit a crime.⁴⁹ The prosecution case is that the defendant with others agreed to....The prosecution must prove (1) the agreement, (2) that the defendant joined the agreement, (3) that the defendant knew what he was agreeing to, and (4) that when he joined the agreement the defendant intended that he or some other party to it should carry the agreement out.

- The issues raised may, and usually will, make it necessary to explain the structure and evolution of the conspiracy as contended by the prosecution. The fact that the defendants are all charged with conspiracy does not necessarily imply that they are all as deeply involved as one another. Conspirators can join and leave a conspiracy while the conspiracy lives on. Their roles may be very different. They need not all be known to one another. They need not know all the details. Directions to the jury as to proof of the conspiracy and the defendant's participation in it should be tailored to the particular facts of the case. They will usually depend upon the issues raised by the defence. The prosecution will usually be relying on inferences from conduct and circumstantial evidence, as to which see Chapter 5 The Prosecution Case and Principles of Criminal Liability (1) Circumstantial Evidence.

Illustration – conspiracy to supply drugs and being involved in the supply of drugs charged in alternative counts - wheel conspiracy – the nature of conspiracy – evidence from which agreement can be inferred - substantive offence in the alternative

The indictment charges the defendants in count 1 with a conspiracy which took place between 1 July and 5 November 2009 to supply class A drugs to X in Manchester. The defendants are also charged in count 2, in the alternative, with being concerned in the supply of class A drugs to X in Manchester on 4 November 2009. The prosecution case is that the three defendants conspired together to supply drugs to X in Manchester. If you find a defendant guilty upon count 1 you are not asked to return a verdict in respect of him on count 2. You are asked to consider 2 only if you find that defendant not guilty of the count 1 conspiracy.

Summary of prosecution case

The prosecution case is that at the centre of the conspiracy is D1. D1 recruited D2. They were observed making three journeys in the same car from London to Manchester. On each occasion they stopped at the same address where D2 was seen to deliver a holdall. For the fourth trip D1 and D2 changed their method of delivery. D1 recruited D3 to carry the drugs accompanied by D2. D1 remained in London but was in contact by mobile telephone with D2. That night, after the fourth trip, the Manchester address was entered by police officers who found a quantity of class A drugs in holdalls of the same type. The following morning D1 was arrested at his home. D2 and D3 were arrested as they arrived at D1's address in D3's car.

Footnotes

⁴⁹ For conspiracy to defraud see Archbold 33-36/40, 17-62; Blackstone A6.48/53; Smith & Hogan 12th ed. Para 13.3.4.1

Count 1 – conspiracy to supply

A conspiracy is an agreement between two or more people to commit a crime. The prosecution must prove (1) the agreement to supply class A drugs to X in Manchester (2) that the defendant joined the agreement and (3) that when he joined the agreement the defendant intended that he or some other party to it should carry the agreement out.

The prosecution case is that there was a conspiracy between D1 and D2, later joined by D3, to supply a class A drug to X in Manchester.

Summary of defence cases

D1 and D2 deny that there was an agreement to supply class A drugs. They say that while the evidence of their movements and communications may seem suspicious they were in fact innocent. D3 admits that he was asked by D1 as a favour to drive D2 to Manchester and that is what he did. He admits that D1 placed a large holdall in the boot of his car which, at their destination, was removed and handed to a man unknown to him. But, he says, he had no knowledge that the holdall contained drugs, nor of the existence of any conspiracy and had no intention that any offence of supplying drugs should be committed.

Conspiracy D1 and D2

Let us consider the position of D1 and D2 first. There is no direct evidence of an agreement between the defendants to supply drugs to Manchester. That is not unusual. Those who commit crime do not always disclose to others what they are doing or what they are intending to do. The agreement can be inferred from the activities of the defendants. Consider the evidence of surveillance, of telephone contact, of call mapping evidence and the recovery of drugs. Consider also the explanations given by D1 and D2 in interview and in evidence. Are you driven to the conclusion so that you are sure that they establish an agreement between D1 and D2 to supply drugs to X in Manchester, or may it be that the explanations they have given are true?

You must be sure that there was an agreement between D1 and D2 to supply class A drugs to X in Manchester with the intention that they or either of them would do so. If you are sure, then your verdict will be guilty, count 1, in the cases of D1 and D2. If you are not sure, then your verdict must be not guilty, count 1, in the cases of D1, D2 and D3.

Conspiracy D3

If you are sure there was a conspiracy between D1 and D2 then you will need to decide whether D3 joined it. It is not necessary that every conspirator should be in at the beginning or that every conspirator should play a major part; nor is it necessary that D3 should have known the details of the previous supply, or the identity of X, provided that he joined what he knew to be an ongoing conspiracy to supply class A drugs to a person or persons in Manchester. Here, the prosecution case is that D3 joined the conspiracy after the first three trips, participated in the fourth trip and would have participated in a fifth had he not been arrested. If you are sure that D3 agreed to join an ongoing conspiracy between D1 and D2 intending that drugs should be supplied to Manchester then your verdict will be guilty, count 1, in his case too.

Count 2 - being concerned in the supply

I turn next to count 2 which charges D1, D2 and D3 in the alternative with being concerned in the supply of class A drugs. Count 2 relates only to the fourth trip to Manchester. The prosecution does not ask you to find any defendant guilty of both counts. If you have found a defendant guilty of count 1 you need not consider his position in count 2. Count 2 is included in the indictment to cover two possible eventualities:

First, if you are not sure that there was an ongoing conspiracy between D1 and D2, in other words, if you are not sure that the evidence of their activities establishes an agreement to supply class A drugs, then you need to consider, in the cases of D1, D2 and D3, whether they were concerned in the supply of class A drugs on the fourth trip.

The second possible eventuality is that you are sure there was an ongoing conspiracy between D1 and D2 (and therefore that they are guilty of count 1) but you are not sure that D3 was aware of or joined that conspiracy. In that case you will need to concentrate on the question whether D3 was, nevertheless, concerned in the supply of drugs on the fourth trip.

A defendant is guilty of count 2 if the prosecution proves so that you are sure that he took some part in the arrangements for delivery of class A drugs on the fourth trip, intending that the delivery should take place. I have prepared a Route to Verdict which will enable you to address all relevant questions in the correct sequence and, by that means, to arrive at a verdict in respect of each defendant. Let us read it together.

Illustration – Route to Verdict

Please answer Question 1 first and proceed as directed

Question 1 (Conspiracy D1 and D2)

Are you sure that D1 and D2 conspired together to supply class A drugs to X in Manchester? See Note 1 below

If you are sure they did, verdicts in the cases of D1 and D2 guilty count 1, and proceed to question 2

If you are not sure they did, verdicts in the cases of D1, D2 and D3 not guilty count 1, and proceed to question 3

Question 2 (Conspiracy D3)

Are you sure that D3 joined the criminal conspiracy between D1 and D2 to supply class A drugs to X in Manchester? See Note 2 below

If you are sure that D3 joined the conspiracy, verdict in the case of D3 guilty count 1 and proceed no further

If you are not sure that D3 joined the conspiracy, verdict in the case of D3 not guilty and proceed to question 3

Question 3 (Being concerned in supply 4 November 2009 D1, D2, D3)

Are you sure that the defendant whose case you are considering (D1, D2, or D3) was concerned in the supply of a class A drug to X in Manchester on 4 November 2009? See Note 3 below

If you are sure that the defendant was concerned in a supply on 4 November 2009, verdict guilty count 2

If you are not sure that the defendant was concerned in a supply on 4 November 2009, verdict not guilty count 2

Note 1:

D1 and D2 conspired together if they made an agreement to supply class A drugs to X in Manchester intending to make supplies.

Note 2:

D3 joined the conspiracy between D1 and D2 if (1) he knew there was an existing agreement between D1 and D2 to supply class A drugs to someone in Manchester (2) he joined the agreement and (3) he intended that one or more of them would carry the agreement into effect.

Note 3:

You will be considering Question 3 only if you have found the defendant not guilty of count 1. The defendant was concerned in the supply if he took some part in arrangements for the delivery of class A drugs to X in Manchester on 4 November 2009 intending that the delivery should take place.

Sources

Archbold 33-1/77; Blackstone A6.33/53; Smith & Hogan 12th ed. Para 13.3., page 399

(3) Intention

Introduction

Section 8 Criminal Justice Act 1967 provides that a jury is not bound to infer that the defendant intended (or foresaw) a result of his actions by reason only of it being a natural and probable consequence of those actions, but shall decide whether the defendant did intend (or foresee) that result by reference to all the evidence, drawing such inferences as appear proper in the circumstances.

The fact that a result was a natural and probable consequence of D's action does not, therefore, prove that D intended or foresaw that result. D's actual foresight of the result may or may not enable the jury to infer intention.

Directions

- 'Intention' is a word incapable of further satisfactory analysis. 'Want' or 'desire' are not synonyms for 'intend' since it is open to the jury to infer intention from the defendant's awareness of the virtual certainty of consequences of his conduct, even though they accept that the defendant hoped that the result would not occur.⁵⁰ The word 'intend' is readily understood if used in the context in which the jury need to consider it.
- Intention is a state of mind which the jury can resolve only by inference or by the admission of the defendant.
- Elaboration will almost never be required. If it is (where D may not have wanted or desired the kind of harm his act caused but the prosecution contends that he was aware of the likely consequence) then the jury should be directed that foresight of consequences is not proof of intent but only one factor to be considered.⁵¹
- A specific direction will usually be required only when a specific intent is in issue.
- The jury should be told from what sources of evidence they can consider drawing the inference.

Footnotes

⁵⁰ *Hancock and Shankland* [1986] CA 455; *Woollin* [1999] 1 AC 82

⁵¹ *Hancock and Shankland* (supra) at page 474

Illustration – intent to cause really serious harm – the intention must accompany the act – drawing the inference from the circumstances

If you are sure that the defendant unlawfully caused really serious bodily harm to V, he is guilty of count 1 if the prosecution also proves that the defendant intended to cause him really serious bodily harm.

The prosecution does not have to prove that the defendant set out with the intention of causing harm. The fact that afterwards the defendant may have regretted what he had done does not amount to a defence. You need to reach a conclusion as to what was his intention during the moments he was using unlawful violence towards V.

Naturally, you can reach a conclusion what the defendant's intention was only by examining the circumstances of the attack on V. This includes what was done and said at the time, the nature and duration of the attack, the use of any weapon, the nature of the injury inflicted on V and the defendant's behaviour immediately afterwards. You should also consider what the defendant had to say about his state of mind in interview and in evidence.

The prosecution relies, in particular, on....

The defendant told you....

If, having examined the evidence, and despite the defendant's denial, you are sure he intended to cause V really serious bodily harm, then your verdict upon count 1 will be guilty. If you are not sure....

- In cases where the defendant's judgement and awareness may be relevant, further explanation is required.

Illustration – dangerous act an indirect cause of really serious harm – foresight of consequences of dangerous act relevant to inference of intention – young defendant with learning difficulties

The defendant accepts that he carried a concrete block from the roadside onto the footbridge over the motorway. He wanted, he said, to have a bit of fun by giving a driver a shock but no more than that. He pushed the block off the bridge parapet at the moment he judged it would hit the bumper of the car driven by V. As we know, the block struck the bonnet of V's car but it bounced and smashed the windscreen. V lost control of the car and the car mounted the bank to the nearside and turned over. The evidence is that V suffered a fractured skull on the right side when his head came into violent contact with the driver's door pillar as the car turned over. The defendant told you that he was very upset by what he had done. He thought the car would swerve a bit, then stop, and the driver would get out not knowing what had hit him.

The defendant is charged with causing grievous bodily harm with intent to cause grievous bodily harm.

The prosecution must first prove that by his unlawful act the defendant caused V really serious bodily injury. The defendant does not dispute that this is what he did.

The real issue between the prosecution and the defence is whether the defendant intended to cause really serious bodily injury. It is not necessary for the prosecution to prove that the defendant knew V or intended to cause really serious injury to V specifically. It is enough if the prosecution prove that the defendant intended to cause an occupant of the car really serious injury.

Naturally, you can reach a conclusion what was the defendant's intention only by examining the circumstances in which the harm was caused and the defendant's own explanation of his state of mind. What are the circumstances which you need to consider?

First, the defendant was, at the time, 16 years of age. You have heard evidence about his personality and his learning difficulties.

Second, consider exactly what he did.

Third, consider what were the likely consequences of what he was about to do. Would those consequences have been obvious to this 16 year old defendant?

Fourth, consider the defendant's own evidence about his awareness of the likely consequences of what he did. It is important that you reach a decision whether the defendant was lying to you or doing his best to tell you the truth.

Do not judge the defendant's awareness with the benefit of hindsight but consider his state of mind as it would have been while the block was resting on the parapet. You may regard the defendant's act as extremely dangerous. Indeed you may conclude that there was a high probability of death or serious injury arising from the defendant's intentional act. I must emphasise, however, that what you are considering is what the defendant himself intended. If you accept that the defendant may have wanted just to give V an unpleasant surprise, that is evidence from which you could conclude that he did not intend to cause really serious harm. On the other hand, if you are sure that the defendant realised it was a virtual certainty that by pushing the block off the parapet really serious harm to someone in the car would follow, it is open to you to conclude that, despite his denial, even though his main purpose may have been merely to derive pleasure from his mischief.

However, you need to bear in mind throughout that this defendant was not an adult. He was aged 16 and in many respects he is still an immature 16 year old. You have heard that his ability to process information and to anticipate events is impaired by his learning difficulty. You must judge not whether the ordinary man would have been aware, but whether this 16 year old defendant himself was aware, of the likely consequences of what he was about to do. If the defendant may not have realised that consequences such as these were almost bound to follow, you could not conclude from the circumstances alone that he intended really serious harm. Even if you were to conclude that the defendant was aware that serious injury was a virtually certain consequence of what he was about to do, that does not mean that you are bound to conclude that he intended it. It would be only one of the factors, an important factor perhaps, from which you could infer his intention.

Having considered all the available evidence in this way, ask yourselves the question, are we sure that the defendant intended to cause someone in the car really serious bodily injury. If you are sure he did, the defendant is guilty of count 1. If you are not sure.....

Sources

Archbold 17-34/36; Blackstone A2.2; Smith & Hogan 12th ed. Para 5.2.1

(4) Intention Formed in Drink or Under the Influence of Drugs⁵²

Introduction

1. The voluntary consumption of drink or drugs cannot avail a defendant charged with a crime of 'basic intent'.⁵³
2. An intent formed in drink or under the influence of drugs is still an intent. The fact a person may not have formed that intent if sober is not a defence.
3. Where a crime of specific intent is alleged, the jury should take the defendant as they find him. They should have regard to his state of intoxication together with all other relevant circumstances when deciding whether he acted with the intent required.⁵⁴
4. The mere fact that the defendant had taken drink does not trigger a requirement to give the jury a direction about it. What is required is evidence of consumption of a quantity which may have affected the defendant's state of mind.⁵⁵ Where there is uncertainty, discussion with the advocates is desirable.⁵⁶
5. The issue for the jury is not whether the defendant had the capacity to form the intention; the question is whether he did have the intention.⁵⁷

Direction

- If the offence requires specific intent the jury should be directed that a drunken intent is still intent. It is immaterial that the intent may not have been formed had the defendant been sober. The quantity of drink taken is just one of the circumstances to be considered when the jury decides whether it is proved that the defendant had the intent required.
- If the crime alleged is one of basic intent in which recklessness is sufficient *mens rea* the jury can be told that the state of the defendant's intoxication can provide no defence.⁵⁸ Where the defendant's awareness is in issue (e.g. whether he realised that his actions might cause harm or other consequences, or whether he realised the existence of a risk) the jury must consider the issue as

Footnotes

⁵² See also (6) Recklessness, Chapter 16 Defences (2) Self Defence and Related Matters, (3) Duress, (4) Insane and Non-Insane Automatism, (5) Provocation and (6) Diminished Responsibility

⁵³ But see Chapter 16 Defences (4) Insane and Non-Insane Automatism for cases of an unforeseen reaction to prescribed medicine and c.f. Kingston [1995] 2 AC 355 (involuntary consumption of drugs leading to intentional but uninhibited act). For discussion of what is a crime of basic intent, see Archbold 17-105/112a; Blackstone A3.10; Smith & Hogan 12th ed. Para 11.4.3; Heard [2008] QB 43; [2007] EWCA Crim 125

⁵⁴ R v. Sheehan and Moore 60 Cr App R 308 at p. 312

⁵⁵ R v. Alden & Jones [2001] 5 Archbold News 3. CtMAC

⁵⁶ R v. Groark [1999] Crim LR 669, CA

⁵⁷ R v. Garlick [1981] 72 Crim App R 291

⁵⁸ Contra, when the intoxication arises from a benevolent drug whose capacity for unpredictability and aggression is generally unknown and the jury has to judge whether taking such a drug was itself reckless: Hardie [1985] 80 Cr App R 157 (valium, criminal damage, being reckless etc.)

though he had been sober. The rationale for this direction is that the defendant's drunkenness is an integral part of his recklessness or it is a pre-existing fault on whose consequences the law does not permit him to rely.⁵⁹ See also [Chapter 5 \(6\) Recklessness](#).

Illustration – crime of basic intent – assault occasioning actual bodily harm - reckless act

The defendant says he was so drunk that he was unaware of what he was doing. If you accept that is or may be true, it provides him with no defence. The defendant is charged with assault occasioning actual bodily harm. The prosecution must prove that (1) the defendant lashed out at V (2) intending to cause V fear of unlawful force or being reckless whether V would fear unlawful force and (3) the defendant's violence did in fact cause V some bodily injury.

The defendant does not dispute that he must have swung his arm towards V causing him a black eye even though he now has no recollection of doing it.

If you are sure that, in his drunkenness, the defendant intended to strike V, he is guilty. If you are not sure he had that intention, you should consider whether he acted recklessly. He was reckless if you are sure (1) the defendant swung out his arm in the direction of V knowing that there was a risk V would fear for his safety and (2) it was unreasonable to take that risk.

In deciding whether the defendant acted recklessly you should judge him as you would if he had been sober. His drunkenness is not an excuse. Had he been sober, would the defendant have realised that his act of swinging his arm in the direction of V risked causing V fear of harm? If so, and if you are sure his act was unreasonable, then the defendant is guilty.

- If the crime alleged is one of specific intent, the jury may be assisted by a reference to the known effects of alcohol or drugs:

Illustration – crime of specific intent – intent to cause really serious harm - effects of alcohol

The defendant's evidence was that he was drunk and, as a result, he remembers little about the events alleged. In particular, he says that he does not remember having any intention to cause really serious harm and does not think he did have that intention.

The evidence of the drink he had taken was.....

You will need to decide whether you accept that the defendant was or may have been as drunk as he says he was, sufficiently drunk to be unaware later that night of what he had done and with what intent. If you accept that the defendant was or may have been drunk, you need to know to what extent that may be relevant to the issues you have to decide.

Footnotes

⁵⁹ *DPP v Majewski* [1977] AC 443, HL ; *R v. Caldwell* [1982] AC 341, HL. See also Smith & Hogan 12th ed. Para 11.4.3/5. Note also the controversial obiter analysis of crimes of basic intent by the court in *Heard* [2007] EWCA Crim 125

We all know that drink can affect people in different ways. Some become docile and sleepy, others become aggressive and violent. If you conclude so that you are sure that the defendant became violent in drink and, while drunk, formed an intention to cause really serious harm, then the requisite intent is proved.

You must judge whether the defendant had that intention at the time when he attacked V. The fact he may not have formed that intent had he been sober does not provide him with a defence. The fact that when he sobered up the defendant could not recall what he had done or with what intent does not assist him. The defendant's state of drunkenness at the time of the violence is just one of the factors which you must consider. Consider all the circumstances as I have described them, including the fact that the defendant was drunk, when judging whether the defendant intended to cause really serious harm. If you are sure he did then he is guilty of count 1. If you are not sure he acted with that intent then....

Sources

Archbold 17-105/113, 113a-117; Blackstone A3.8/12; Smith & Hogan 12th ed. Para 11.4

(5) Dishonesty

Introduction

1. Many offences require proof of dishonesty. Dishonesty is a state of mind which, unless admitted, can only be inferred from conduct. Rarely, the question arises whether the state of mind with which the defendant acted could properly be described as 'dishonest'.
2. In *Ghosh*⁶⁰ the Court of Appeal, choosing between two lines of authority, concluded that the test of dishonesty was subjective. Lord Lane CJ said⁶¹:

"If we are right that dishonesty is something in the mind of the accused (what Professor Glanville Williams calls "a special mental state"), then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct.

So we would reject the simple uncomplicated approach that the test is purely objective, however attractive from the practical point of view that solution may be.

There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which "Robin Hood would be no robber" (see Green and Greenstein (*supra*))⁶². This objection misunderstands the nature of the subjective test. It is no defence for a man to say "I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty." What he is however entitled to say is "I did not know that anybody would regard what I was doing as dishonest." He may not be believed; just as he may not be believed if he sets up "a claim of right" under section 2 (1) of the Theft Act, or asserts that he believed in the truth of a misrepresentation under section 15 of the Theft Act. But if he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest.

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

Footnotes

⁶⁰ [1982] QB 1053 ; [1982] 75 Cr App R 154

⁶¹ At page 162

⁶² [1975] 61 Cr App R 296

3. Many acts of dishonesty, if proved, are so plainly dishonest that no assistance on the meaning of the word is required. In *Roberts*⁶³ and *Price*⁶⁴ the Court of Appeal held that it was not necessary to give the *Ghosh* direction unless the issue was raised that the conduct, admitted or proved, might not be regarded as dishonest by the standards of ordinary people.
4. In *Clarke*⁶⁵ the prosecution case was that the defendant, a private investigator, had made false representations to a group of clients about his former employment and experience. By this means he secured a contract to recover funds of which they had been defrauded. The defendant was charged with obtaining a pecuniary advantage by deception. The defence case was that if he made the representations the defendant did not act dishonestly because he had intended to do the work, was able to do the work and, in due course, did do the work. The trial judge indicated that proof of the false representations would alone be sufficient to prove dishonesty and the defendant pleaded guilty. The effect of such a ruling, the Court of Appeal held, was to remove the issue of dishonesty from the jury. The defendant was entitled to the jury's decision under the first and second limb of the *Ghosh* test whether he was acting dishonestly if he made admittedly false representations to obtain the work with a genuine intention of doing the work.

Directions

- Usually no specific direction will be required.
- Where a specific direction is required, the order of questions posed in *Ghosh* should not be reversed and the words used should be closely followed.⁶⁶ In a case of conspiracy to defraud the issue is whether what the defendant agreed to do was dishonest.
- It may be necessary to explain the distinction between knowledge of the law and knowledge of ordinary standards of honesty and dishonesty. In *Lightfoot*⁶⁷ the defendant was caught trying to obtain goods on a credit card issued to his employer. He had already purchased valuable goods by forging his employer's signature on the transaction slips. The defence case was that the defendant had been given the card to make transactions. He did not think he was committing any offence. The jury inquired whether ignorance of the law was a defence. The trial judge replied, without more, that it was not. The Court of Appeal held that in the circumstances the judge should have explained the difference between ignorance of the law (which was irrelevant) and dishonesty (which was relevant). The defendant had been deprived of a possible defence that he did not realise ordinary people would regard using his employer's card with his employer's consent as he did was dishonest, even though he admittedly forged his signature when doing so.

Footnotes

⁶³ [1987] 84 Cr App R 117

⁶⁴ [1990] 90 Cr App R 409

⁶⁵ [1996] Crim LR 824

⁶⁶ *Green* [1992] Crim LR 292; *Hyam* [1997] Crim LR 439

⁶⁷ [1993] 97 Cr App R 24

Illustration – the Ghosh questions

If you are sure that the defendant acted as the prosecution alleges, the final issue is whether the defendant was acting dishonestly. In order to resolve that issue you need to consider two questions:

1. *Was what the defendant did dishonest by the ordinary standards of reasonable and honest people? It is for you to decide what those standards are and to apply them to this question.*

If what the defendant did was not or may not have been dishonest by those standards you must find him not guilty. If, however, you are sure that reasonable and honest people would consider the defendant's actions to have been dishonest you should move to the second question.

2. *Must the defendant have realised that what he was doing would be considered dishonest by those standards? You are, in other words, drawing an inference as to what was the defendant's own state of mind.*

If you are sure that the defendant knew that what he was doing was dishonest by the ordinary standards of reasonable and honest people then he is guilty, whether he personally regarded it as dishonest or not.

Sources

Archbold 21-2c/3; Blackstone B4.40; Smith & Hogan 12th ed. Para 19.2.2.

(6) Recklessness

Introduction

1. In *R v. G and Another*⁶⁸, the House of Lords overruled *Metropolitan Police Commissioner v. Caldwell*⁶⁹ (which had held that a defendant was reckless when his act - causing damage - presented an obvious risk of damage and either he took that risk or gave no thought to it) and returned to subjective recklessness as defined in *Cunningham*.⁷⁰
2. Since *R v. G*, a person acts recklessly within the meaning of s.1 of the Criminal Damage Act 1971 with respect to-
 - (i) a *circumstance*, when he is aware of a risk that it exists or will exist;
 - (ii) a *result*, when he is aware of a risk that it will occur;
 and it is, in the circumstances known to him, unreasonable to take the risk.
3. While the House in *G* was dealing with section 1 Criminal Damage Act 1971, the Court of Appeal Criminal Division has accepted the wider application of the decision.⁷¹ The *mens rea* of offences requiring malice, such as section 20 Offences Against the Person Act 1861 remains intention or subjective recklessness and is therefore in line with *G* (i.e. the defendant was aware of a risk of some harm which he then, unreasonably, went on to take).⁷²
4. If the defendant may have been unaware of the risk of circumstance or result under consideration because he was under the influence of drink or drugs the jury must assess his state of awareness as it would have been if he had been sober.⁷³

Directions

- When deciding whether the defendant was reckless, the first stage is a judgement whether the defendant was aware of the risk (subjective).
- The second stage is a judgment whether the risk taken was reasonable in the circumstances of which the defendant was aware (objective).
- If the defendant's ability to appreciate the risk was or may have been impaired through drink the jury should be asked to consider his awareness as it would have been had the defendant been sober. If they are sure the defendant would have been aware of the risk if he had been sober, the first stage is satisfied.

Footnotes

⁶⁸ [2004] AC 1034; [2003] UKHL 50

⁶⁹ [1982] AC 341 (HL)

⁷⁰ [1957] 2 QB 396 (HL)

⁷¹ Att.-Gen's Reference (No. 3 of 2003) [2004] Cr App R 23; [2004] EWCA Crim 868 (Misconduct in public office); *Brady* [2007] Crim LR 564; [2006] EWCA Crim 2413 (s.20 Offences Against the Person Act 1861)

⁷² *Brady (supra)*

⁷³ *DPP v. Majewski* [1977] AC 443, [1976] Crim LR 374. See also Chapter 5 The Prosecution Case and Principles of Criminal Liability (4) Intention Formed in Drink or Under the Influence of Drugs

Illustration – intention – recklessness – drunkenness - criminal damage

The defendant is charged with criminal damage under section 1(1) Criminal Damage 1971. He admits that he lit a fire with newspapers against the wall of the pavilion. He says he was drunk and cold, and lit the fire to keep warm. He says he did not appreciate that the wall of the pavilion was made of wood and believed that the fire would just die out. In fact the wall caught fire and the pavilion burned down.

The prosecution must prove that (1) the defendant set a fire which caused the damage, (2) the defendant had no lawful excuse for causing the damage; (3) either the defendant caused the damage intentionally or he was reckless whether his act of setting the fire would cause damage to the pavilion.

There is no dispute that the defendant (1) set a fire which burned down the pavilion and (2) had no lawful excuse for causing the damage. The issue for you is whether the prosecution has proved that the defendant intended to damage the pavilion or was reckless whether he did so.

Naturally, you can only resolve this issue by examining the circumstances, considering the defendant's explanation, and reaching a conclusion about the defendant's state of mind.

The prosecution relies on the following circumstances to establish that it must have been obvious to the defendant that the pavilion would catch fire if a fire was lit against it....

The defence submitted...

First decide whether, despite the defendant's denial, you are sure he intended to damage the pavilion by setting fire to it. When deciding whether the defendant had that intention his state of intoxication is just one of the circumstances you need to consider. A drunken intention counts the same as an intention formed when sober. If the defendant intended to damage the pavilion, he is guilty.

If you are not sure that the defendant intended to damage the pavilion, then you should consider whether he was reckless as to whether it would be damaged.

You should consider recklessness in two stages. The first question is whether the defendant realised that by lighting the fire there was a risk that the pavilion would catch alight. The defendant is not, however, entitled to take advantage of his own drunkenness. You must judge him as if he had been sober. The question you must ask, therefore, is: Had the defendant been sober, would he have realised that there was a risk of damage to the pavilion? You may find it helpful when considering this question to place yourselves in the defendant's position. If, putting aside the wisdom of hindsight, you conclude that the risk of damage to the pavilion was plain and obvious, then you are entitled to infer that had the defendant been sober he would have too.

If you are sure, either that the defendant was aware, or, had he been sober, the defendant would have been aware of the risk, you move to the second question: Given the degree of risk as the defendant either appreciated it or as must be taken to have appreciated it, was it reasonable or unreasonable for him to light the fire as he did? No argument has been advanced to you as to why it might have been reasonable to risk setting fire to the pavilion. If you are sure that the defendant appreciated the risk, or would have done had he not been drunk, and that it was unreasonable for him to take that risk, your verdict would be guilty.

I have prepared a Route to Verdict which sets out in the correct sequence the questions you need to resolve. Let us read it together.

Illustration – Route to Verdict

Please answer Question 1 and proceed as directed

Question 1

Did the defendant deliberately light a fire which in fact caused damage to the pavilion?

Admitted. Go to question 2

Question 2

When he lit the fire did the defendant intend to damage the pavilion?

If you are sure the defendant intended to damage the pavilion, verdict guilty and proceed no further

If you are not sure the defendant intended to damage the pavilion, proceed to question 3

Question 3

Was the defendant aware that by lighting the fire there was a risk that the pavilion would be damaged?

If you are sure **either** that the defendant was aware of the risk **or** that he would have been aware of the risk if he had been sober, proceed to question 4

If you are not sure that the defendant was aware of the risk **and** you are not sure that he would have been aware of the risk if he had been sober, verdict not guilty

Question 4

Was it unreasonable for the defendant to take the risk of damaging the pavilion by lighting the fire?

If you are sure it was unreasonable to take the risk, verdict guilty

If you are not sure it was unreasonable, verdict not guilty

Sources

Archbold 17-50/52 (generally); 19-167 (assault and battery); 19-211 (wounding); 23-9/21 (criminal damage)

Blackstone A2.3/6 (generally); B2.10 (assault and battery); B2.49 (wounding); B8.8 (criminal damage)

Smith & Hogan 12th ed. Para 5.2.2, 11.4.3.1, pages 298-300, 11.4.5

(7) Criminal Attempts

Introduction

By section 1(1) Criminal Attempts Act 1981 the *actus reus* of an attempt to commit an offence is an act “more than merely preparatory to the commission of the offence”. To constitute an attempt the act must be accompanied by an intention to commit the full offence even if the full offence is one which requires a lesser degree of *mens rea* (e.g. attempted wounding requires an intent to wound, attempted murder requires an intent to kill) or is an offence of strict liability. It does not matter that the offence which the defendant is intending to commit is impossible by reason of facts unknown to him (section 1(2); *Shivpuri* ⁷⁴). It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved do amount to an attempt.

Directions

- The judge should follow the words of the statute.⁷⁵
- It is, however, common practice and, save in the obvious case, useful to explain and/or illustrate the difference between an attempt to commit an offence and acts preparatory to an offence. The jury should be told that the issue whether the act *was* more than merely preparatory is for them to decide.
- Where impossibility has featured in the evidence, the jury should be told that they must be sure of an attempt to commit the offence *intended* (e.g. the fact that the victim’s pockets were empty is no defence to attempted robbery).

Sources

Archbold 34-83/101; *Blackstone* A1.3, A6.60/70; *Smith & Hogan* 12th ed. Para 13.1/2

Footnotes

⁷⁴ [1987] AC 1 (HL)

⁷⁵ *R v. Campbell* [1991] 93 Cr App R 350

(8) Parties to Crime

Introduction

Principal and Secondary Parties

1. In England and Wales an offence may be committed by a principal or a secondary party. For present purposes a *principal party* (P) can be taken to mean one who, personally, or by means of an innocent agent, committed the conduct element of the offence or the *actus reus*. There may be more than one principal offender when the conduct amounting to the *actus reus* was committed by more than one person (e.g. if P1 and P2 attack V with their fists, with intent to cause some harm, and together do really serious harm to V, they are both principals in the offence of causing grievous bodily harm contrary to section 20 Offences Against the Person Act 1861). A *secondary party* (D) is one who, while not the principal offender, aids, abets, counsels or procures the offence.
2. By section 8 Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977 “Whosoever shall aid, abet, counsel or procure the commission of any indictable offence....shall be liable to be tried, indicted and punished as a principal offender”. For the purpose of trial, therefore, a secondary offender is to be treated in the same way as a principal.
3. However, ‘secondary liability’ for commission of the offence is usually derived from the conduct of the principal offender. For this reason it is important when framing directions to identify, if possible, the conduct of the principal offender(s) which comprises the *actus reus*. From this starting point, the conduct and *mens rea* required to prove the guilt of a secondary party can be more readily identified and explained. When the prosecution case is that the defendant was a secondary party to the offence it may be appropriate for the indictment to say so⁷⁶ and for the Route to Verdict to identify the elements which constitute the defendant’s secondary liability.

Where the principal offender cannot be identified

4. It may not be possible for the prosecution to identify the principal offender, for example when one of a group carrying out an attack on V produces a knife and stabs V. That will not save a defendant from conviction founded on the act of stabbing, provided that the jury can be sure that D was *either* the principal offender who stabbed V *or* a secondary party to that offence. Whether he was a principal or secondary offender he can be convicted as a principal offender by virtue of the provisions of section 8 of the 1861 Act.

Routes to Principal or Secondary Liability

5. Legal liability for a criminal offence may arise because the defendant:
 - (i)(a) either alone or through the innocent agency of another or in combination with another *committed* the offence (principal or joint principal)⁷⁷;
 - (i)(b) *took part* in the offence as a secondary party (aiding and abetting)⁷⁸;

Footnotes

⁷⁶ E.g. Archbold 18-32

⁷⁷ Archbold 18-7/14, 18; Blackstone A5.1

⁷⁸ As footnote 71

- (ii) by his own conduct and with intent assisted another to commit the offence (aiding and abetting)⁷⁹;
 - (iii) by words, conduct and/or presence, intentionally encouraged another to commit the offence (aiding and abetting)⁸⁰;
 - (iv) directed or, with the requisite intention, enabled the offence committed (counselling or procuring)⁸¹;
 - (v) joined and participated in an enterprise to commit one offence in the course of which, as the defendant either intended or realised, the other offence would or might be committed (joint enterprise)⁸².
6. The common law has not always developed consistently from established principle; hence, the frequent calls for Parliamentary intervention.⁸³ However, “secondary liability is a common law doctrine the rules of which are generally the same irrespective of the context in which D provides encouragement or assistance and regardless of the seriousness of the principal offence.”⁸⁴

Requirements for Secondary Liability

7. With some exceptions (for example, in some cases of “counselling or procuring”⁸⁵) the secondary liability of D is dependent upon or derives from the commission of a principal offence by the principal offender, P. To prove the secondary liability of D the prosecution must establish
- Conduct by D amounting to assistance to, or encouragement of, P;
 - An intention to assist or encourage P to commit the principal offence; **and**
 - D’s knowledge of the essential matters which constitute the principal offence.⁸⁶

It is the third requirement which has generated most debate. “*The principal offence*” comprises the conduct, qualifying circumstances, consequences and fault required for its commission.

However, the term ‘*knowledge*’ requires qualification. It is not necessary for D to ‘know’ all the details of P’s plans or of the principal offence committed provided he knows the matters essential to the principal offence. For example, if D supplies P with a jemmy to enable P to commit a burglary it is not necessary to

Footnotes

⁷⁹ Archbold 18-10; Blackstone A5.1

⁸⁰ Archbold 18-18,19; Blackstone A5.13

⁸¹ Archbold 18-20/24; Blackstone A5.1; A5.11

⁸² Archbold 18-15/17; Blackstone A5.5/12

⁸³ See Law Commission Report (Law Com 305) “Participating in Crime” May 2007, particularly its valuable Appendix B “The Current Law” <http://www.lawcom.gov.uk/docs/lc305.pdf>

⁸⁴ Law Com 305 at §2.4

⁸⁵ See (iv) *Directing or Enabling* below

⁸⁶ *Johnson v. Youden* [1950] 1 KB 544 at page 546

prove that D knew the date, time and place of the burglary actually committed.⁸⁷ Furthermore, the Court of Appeal has found, as a sufficient substitute for knowledge, the foresight by D of a real possibility that P will act as he did.⁸⁸ This is an application of the *Powell, Daniels and English*⁸⁹ test in joint enterprise cases to situations where no common purpose between P and D is alleged.

The requirement for knowledge of “consequences” has been modified in cases of constructive liability for the consequence such as murder, manslaughter, inflicting grievous bodily harm and wounding, where D knows that the consequence of the act is a *risk* that P’s act will cause some harm. So it is enough if D knows/foresees that P will act in a way which creates an obvious risk of some harm to V which in fact causes death/grievous bodily harm/wound.

As to “*fault*” the defendant must be aware that P will act with the intention required to commit the offence. In a case of murder D must be aware of the real possibility that P will act with the intent required for murder.⁹⁰

Where the foundation for the secondary liability of D for offence Y is his participation in a “joint enterprise” or “common purpose” to commit offence X, “knowledge” of the intention of P for the commission of offence Y is to be interpreted as foresight of a real possibility that P will act with the intent required for the offence. So if P and D embark on a robbery in the course of which P kills with intent to do really serious bodily harm, D is guilty of murder if he participated in the robbery knowing there was a *real possibility* that P might, if confronted, attack V with intent to do really serious bodily harm.⁹¹

An offence may be “counselled” if D advises or solicits it. The prosecution does not have to prove that the counselling caused the offence; only that D counselled the offence which was committed by P acting within the scope of his authority.⁹²

“Procuring”, however, denotes “setting out to see that [a thing] happens and taking the appropriate steps to produce that happening”.⁹³ There must be a causal link between the procuring and the event procured.

Joint Enterprise and the Foresight Principle

8. In *Powell and English*⁹⁴ the House of Lords confirmed and endorsed a line of authority that in joint enterprise cases the test for the secondary liability of D, when P went further than D intended, was whether D, foreseeing that P may act as he did in furtherance of the common design, nevertheless participated in the joint enterprise. Lord Hutton said:⁹⁵

Footnotes

⁸⁷ *Bainbridge* [1960] 1 QB 129

⁸⁸ *Reardon* [1999] Crim LR 392 (see para 12 below); *Bryce* [2004] EWCA Crim 1231; [2004] Crim LR 936 (see Professor Ashworth’s commentary upon the extension of the principle); *Webster* [2006] EWCA Crim 415 at §21-25; Note also Smith & Hogan 12ed pp 198-218

⁸⁹ [1999] AC 1; [1997] UKHL 45

⁹⁰ *Powell and English* [1999] AC 1; [1997] UKHL 45

⁹¹ *Chan Wing-Sui* [1985] 1 AC 168 (PC); *Hui Chi-Ming* [1992] 1 AC 34 (PC).

⁹² *Calhaem* [1985] QB 808, [1985] 81 Cr App R 131

⁹³ *Attorney General’s Reference (No 1 of 1975)* [1975] QB 773, [1975] 61 Cr App R 118

⁹⁴ [1999] AC 1

⁹⁵ At page 15

"The principle stated in *Reg. v. Smith* [1963] 1 WLR 1200 was applied by the Privy Council in *Chan Wing-Siu v. The Queen* [1985] A.C. 168 in the judgment delivered by Sir Robin Cooke who stated, at p. 175: "The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express or is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight

The principle stated by Sir Robin Cooke in *Chan Wing-Siu's* case was followed and applied in the judgment of the Court of Appeal in *Reg. v. Hyde* [1991] 1 Q.B. 134, where Lord Lane C.J. took account of Professor Smith's comment on *Reg. v. Wakely* [1990] Crim LR 119 that there is a distinction between tacit agreement and foresight and made it clear that the latter is the proper test."

9. Where, however, the act committed by P is fundamentally different from that contemplated by D, D will not be liable. Lord Hutton said:⁹⁶

"Mr. Sallon, for the appellant, advanced to your Lordships' House the submission (which does not appear to have been advanced in the Court of Appeal) that in a case such as the present one where the primary party kills with a deadly weapon, which the secondary party did not know that he had and therefore did not foresee his use of it, the secondary party should not be guilty of murder. He submitted that to be guilty under the principle stated in *Chan Wing-Siu* the secondary party must foresee an act of the type which the principal party committed, and that in the present case the use of a knife was fundamentally different to the use of a wooden post.

My Lords, I consider that this submission is correct. It finds strong support in the passage of the judgment of Lord Parker C.J. in *Reg. v. Anderson*; *Reg. v. Morris* [1966] 2 Q.B. 110, 120 which I have set out earlier, but which it is convenient to set out again in this portion of the judgment:

"It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

The judgment in *Chan Wing-Siu's* case [1985] A.C. 168 also supports the argument advanced on behalf of the appellant because Sir Robin Cooke stated, at p. 175:

"The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.""

10. It should be noted that the fact P's act was fundamentally different from those contemplated by the common design is not identified by Lord Hutton as a separate test by which D's liability should be excluded; rather, it is an application of the *evidence* to the foresight test. If the act was fundamentally different from the agreed course of action it is, on the evidence, improbable or impossible that D was aware P might act as he did in furtherance of the common design.

Footnotes

⁹⁶ At page 21

11. The issue for the jury will be whether, when participating in offence X, *D foresaw* that, in the course of committing it:

- there was a real risk that P would commit the conduct element of the offence Y,
- with knowledge of the prescribed circumstances which make it an offence, **and**
- that P might commit the conduct element of offence Y with the *mens rea* required for offence Y.

Professor Sir John Smith QC called this ‘parasitic accessory liability’.⁹⁷

Extension of the Foresight Principle

12. The case of *Reardon*⁹⁸ is important because it applied *Powell and English* principles to a defendant (D) who was not involved in a joint enterprise with P. P shot two men in a bar and was assisted by others to remove their bodies to the garden. P returned to the bar and said, “[He’s] still alive”, not distinguishing between the two victims, and asked D to lend him his knife which D promptly handed over. P used the knife to finish off both victims. The Court of Appeal held that D was either guilty of both murders or of neither. D was guilty of both murders because he foresaw that P would use the knife to finish off one of the victims; thus, he must have foreseen as a real possibility that P would use the knife to finish off the other if necessary. D’s liability was formulated upon D’s foresight of the real possibilities arising from D’s act of assistance even though there was a lack of common purpose as in *Chan Wing Siu*⁹⁹ and *Powell and English*¹⁰⁰. In his commentary upon the judgment delivered by Beldam LJ, Professor Sir John Smith QC noted the extension of the principle of common purpose.¹⁰¹

Footnotes

⁹⁷ Smith & Hogan 12 ed. Page 209

⁹⁸ [1999] Crim LR 392 ; see also *Bryce* [2004] EWCA Crim 1231; [2004] Crim LR 936 and Professor Ashworth’s commentary upon the extension of the principle; and *Webster* [2006] EWCA Crim 415 at §21-25

⁹⁹ [1985] AC 168

¹⁰⁰ [1999] AC 1

¹⁰¹ Professor Smith wrote: “This is a very important decision because it appears to decide that the principles applicable to an accessory who shares a common purpose with the principal are equally applicable to an accessory who does not. Probably most accessories have a common criminal purpose but some do not. For example: (i) B, knowing that A intends to commit murder, sells him a gun, being interested only in the cash profit and completely indifferent whether A uses the gun to commit murder. A does so use it. (ii) B merely encourages A who has already made up his mind to commit the crime: *Giannetto* [1997] 1 Cr.App.R. 1; [1996] Crim.L.R. 722; or a spectator urges on the combatants in an unlawful fight. (iii) B procures A to commit the crime without A’s knowledge or consent. He laces A’s drink, knowing that this will cause A to drive with excess alcohol. Where there is a common purpose, it is clearly settled that B is liable, not only for (i) the commission by A of a crime which it was their common purpose to commit, but also for (ii) the commission by A of a different crime, which it was not their common purpose to commit, but which B knew that A might commit in the course of executing the common purpose. For the purposes of exposition, (ii) may be designated “parasitic accessory liability”. See “Criminal Liability of Accessories” (1997) 93 L.Q.R. 453 at 444-445. The question is whether parasitic liability applies in cases where there is no common purpose. The present case seems to decide that it does, at least in the circumstances of example (i), above.

13. In *Bryce*¹⁰² D drove P carrying a shotgun to a caravan where P could watch the movements of V. Thirteen hours later P shot V to death. D's defence was that he did not know P was carrying a shotgun. He was just giving him a lift. D argued that even if he was aware that P was thinking of shooting V, he was not liable as an accessory because he could not and did not know that P intended to shoot V when P did not form that intention for several hours. Potter LJ observed that the Court of Appeal had already extended the *Powell and English* principle to assistance given before the commission of the offence. In *Rook*¹⁰³ Lloyd LJ said:

"It is now well established that in a case of joint enterprise, where the parties are both present at the scene of the crime, it is not necessary for the prosecution to show that the secondary party intended the victim to be killed, or to suffer serious injury. It is enough that he should have foreseen the event, as a real or substantial risk: see *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168, *R v Hyde* [1990] 3 All ER 892, [1991] 1 QB 134 and *Hui Chi-ming v R* [1991] 3 All ER 897, [1992] 1 AC 34. Thus, a secondary party may be liable for the unintended consequences of the principal's acts, provided the principal does not go outside the scope of the joint enterprise.

We see no reason why the same reasoning should not apply in the case of a secondary party who lends assistance or encouragement before the commission of the crime."

14. Potter LJ continued:¹⁰⁴

"We are of the view that, outside the *Powell and English* situation (violence beyond the level anticipated in the course of a joint criminal enterprise), where a defendant, D, is charged as the secondary party to an offence committed by P in reliance on acts which have assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D in the sense of an intention to assist (and not to hinder or obstruct) P in acts which D knows are steps taken by P towards the commission of the offence. Without such intention the *mens rea*

Footnotes

101 (contd)

The appellant relied on a proposition in Smith & Hogan, p. 142, to the effect that if B assists or encourages A to commit a crime against a particular, specified, person, X, he is not liable if A intentionally commits an offence of the same type against another person, Y. There is nothing controversial about this proposition - it has long been stated in the works of authority on the criminal law and the present court casts no doubt on it. Here assistance was given for the purpose of killing only one person, but that one was not designated. The killer apparently had only one person in mind, when he borrowed the knife but the intended victim was an unspecified one of two. There is no way of distinguishing between the two victims. If M had killed only one, the case would have been quite straightforward; but he killed two with the knife, going beyond his declared purpose. The appellant was guilty of two murders or of none. The court finds that he is guilty of both by virtue of what may be called the Chan Wing Siu/Powell/English principle. He must have foreseen (and therefore did foresee) that there was "at least the strong possibility" - presumably the same as the "real risk" referred to in some earlier cases - that M would commit, not only the one murder actually encouraged, but the second murder as well.

In this case the offence expressly encouraged and the offence foreseen as a real risk were the same - murder. But the principle would appear to apply where the foreseen offence is greater than the offence intentionally encouraged or assisted. D, coming by chance upon his friend E resisting arrest by a constable, trips up another officer coming to the assistance of the first. He intends to assist, and does assist, E to resist lawful arrest. E draws a knife and stabs the constable through the heart. If D knew that E habitually carried a knife and that there was a real risk, a strong possibility, that, in these circumstances, he would use the knife with intent to kill, D would be guilty of murder. Those who think the law is already too severe may be dismayed by this result. No doubt the Law Commission is giving close attention to these developments in its reconsideration of the law relating to secondary liability. [J.C.S.]"

¹⁰² [2004] EWCA Crim 1231; [2004] Crim LR 936

¹⁰³ [1993] 2 All ER 955 and [1993] Crim LR 698

¹⁰⁴ At §71

will be absent whether as a matter of direct intent on the part of D or by way of an intent sufficient for D to be liable on the basis of 'common purpose' or 'joint enterprise'. Thus, the prosecution must prove:

- (a) an act done by D which in fact assisted the later commission of the offence,
- (b) that D did the act deliberately realising that it was capable of assisting the offence,
- (c) that D at the time of doing the act contemplated the commission of the offence by A i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and,
- (d) that D when doing the act intended to assist A in what he was doing."

15. In *Webster*¹⁰⁵, D handed the controls of a car to P whom he knew to be drunk. It was argued on D's behalf that he could not be criminally liable for P's dangerous driving. The Court of Appeal disagreed. Moses LJ said:¹⁰⁶

"The very foundation of the decision in *R v Powell & English* [1999] AC 1 is acceptance of the principle that a secondary party is criminally liable for the acts of the principal if he foresees those acts even though he does not necessarily intend them to occur (see e.g. Lord Hutton at page 27 to page 28). Evidence that the appellant knew that Westbrook had not only been drinking but appeared to be intoxicated was powerful evidence that he foresaw Westbrook was likely to drive in a dangerous manner at the time he permitted him to drive. But evidence of Westbrook's apparent intoxication did not determine the issue. It was merely evidence which tended to prove the conclusion which the jury had to reach before it convicted him. In short, the more drunk Westbrook appeared to be, the easier it was for the prosecution to prove that the appellant foresaw that he was likely to drive dangerously if he permitted him to drive."

He continued:¹⁰⁷

"Further, we must emphasise what the prosecution had to prove in relation to the appellant's state of mind. It accepted that it was not sufficient to prove that the appellant ought to have foreseen that Westbrook would drive dangerously. The prosecution had to prove that the appellant did foresee that Westbrook was likely to drive dangerously when he permitted him to get into the driver's seat (see *Blakely, Sutton v DPP* [1991] Crim LR 763). We stress the need to focus upon the appellant's state of mind because of certain criticisms made in relation to the wording of the judge's directions to the jury on this issue. Generally the prosecution will be able to prove the actual state of mind of the defendant, absent any confession, by reference to what must have been obvious to him from all the surrounding circumstances. But it is important to distinguish between that which must have been obvious to a defendant and what the defendant foresaw. In most cases there will be no space between the two concepts; if the prosecution can prove what must have been obvious, it will generally be able to prove what the defendant did foresee. But the danger of eliding the two concepts, namely what the defendant did foresee and what he must have foreseen, is that it might suggest that it is sufficient to prove what the defendant ought to have foreseen. That is not enough. It is the defendant's foresight that the principal was likely to commit the offence which must be proved and not merely that he ought to have foreseen that the principal was likely to commit the offence.

We conclude that in order to prove that the appellant was guilty of aiding and abetting Westbrook to drive dangerously, the prosecution had to prove that at the time he permitted him to drive he foresaw that Westbrook was likely to drive in a dangerous manner."

Footnotes

¹⁰⁵ [2006] EWCA Crim 415

¹⁰⁶ At §23

¹⁰⁷ At §25 and 26

16. It is suggested that the foresight principle is equally applicable to offences of counselling and procuring and, for the same policy reasons, if D foresaw as a real possibility that P would exceed the acts he was counselling or procuring, he should be liable as a secondary party.

The trial judge's task

17. It will usually be unnecessary for the judge to embark on a full explanation of terms which define criminal liability. It is enough, and more helpful, to inform the jury what it is the prosecution must prove before the defendant can be convicted. There is no need, for example, to embark on a lengthy exposition of the law of joint enterprise when it is common ground the offence was committed by at least one individual and the sole issue is whether the defendant participated. It will be necessary only to identify the act of participation and the state of mind which the prosecution must prove to establish the defendant's guilt. In every case it will be necessary for the judge to identify what must be proved against a defendant within the factual context of the case before him.
18. In the more complex cases in which the jury will need to consider the different positions of multiple defendants, or where the policy of the law towards liability of secondary parties is not straightforward, it may well be necessary to give a fuller explanation and to provide the jury either with written directions or a note explaining their route to verdicts or both.

Directions

(i) Participation (Simple Joint Enterprise)

- The jury should be directed that the offence charged can be committed by one person or more than one person. If two or more people act together with a common criminal purpose to commit an offence they are each responsible, although the parts they play when carrying out that purpose may be different. For example, two burglars may enter a house together and together remove a television set. They are both guilty of burglary. Or, one burglar may enter the house while the other keeps watch for him outside. Again, they are both guilty of burglary.
- The prosecution must prove participation by the defendant with a common purpose. While participation with a common purpose implies an agreement to act together (a joint enterprise), no formality is required. The agreement can be made tacitly and spontaneously, and may be inferred from the defendants' actions.
- When two or more people act together to bring about the result, their participation need not be precisely contemporaneous; one may begin and others join in. For example, if D1 attacks V and D2 joins in, and V suffers really serious harm, each is liable for causing grievous bodily harm contrary to section 20 OAPA 1861. The jury need not be concerned to isolate the acts of the participants in order to decide which of them caused the really serious injury; they are both liable if they participated together in acts which they knew risked causing bodily injury and which actually caused really serious bodily injury.¹⁰⁸

Footnotes

¹⁰⁸ *Grundy* 89 Cr App R 333. See also *Parties to a Joint Enterprise*

The first Illustration is designed to reflect a direction in a straightforward case. The second Illustration is designed to deal with the cut-throat defence.¹⁰⁹

Illustration – two co-accused – burglary - common purpose – inferring the common purpose – parts played in fulfilling the common purpose – verdicts need not be the same

An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose.

The defendants' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.

Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that each defendant took some part.

Here the prosecution case is that D1 and D2 acted together to commit burglary. D1's part was to enter the house and remove property. D2's part was to keep watch outside. Their actions, the prosecution asserts, clearly had a common purpose.

D1's defence is that he was not present; D2's defence is that although he was outside the property, he was not there to take part in any offence.

If you are sure D1 and D2 did act together to commit the offence your verdict is guilty in the case of each defendant.

You must consider the case of each defendant separately. It is open to you to conclude that your verdicts should be the same in each case but it does not follow that they have to be. Provided you are sure that a burglary was committed by one or more than person, if you are sure that one defendant took some part in that offence but you are not sure about the other, your verdict can be guilty in respect of one defendant and not guilty in respect of the other.

Illustration – two co-accused – section 18 grievous bodily harm – joint assault on V – dispute which accused caused grievous bodily harm – joint enterprise to cause some harm – defendant may be either principal or secondary offender

D1 and D2 are jointly charged with causing grievous bodily harm with intent, contrary to section 18 Offences Against the Person Act 1861, and, in the alternative, with the lesser offence of inflicting grievous bodily harm, contrary to section 20.

Footnotes

¹⁰⁹ *Swindell and Osborne* [1846] 2 C&K 230, 175 ER 95; *Mohan* [1967] 2 AC 187 (It is not essential to prove the role of each defendant provided that he was either a principal or a secondary party)

They both admit that they took part together in an unlawful assault upon V by kicking him while he was on the ground. V suffered serious injuries from kicks delivered to his head. It is clear, and the defendants do not contest, that whoever delivered those kicks caused really serious injury and intended to do so. However, each of them denies aiming kicks to the head; each blames the other; each says he intended to cause V only some physical harm by kicking him to his legs and body. They both say that the act of kicking to the head was quite different from the assault they intended or anticipated.

The defendants jointly embarked on the unlawful assault of V and each of them accepts that he intended to cause some harm. They are each liable for the acts of the other and each of them is at least guilty of inflicting grievous bodily harm, count 2. However, the prosecution case is that they are both guilty of count 1, causing grievous bodily harm with intent.

Count 1 requires the proof of a specific intent, namely the intent to do really serious harm. There are two ways in which the prosecution can establish that intent against each defendant. The first is to prove that the defendant, at the time of the joint assault, kicked V to the head personally intending that V should suffer really serious harm. Alternatively, the prosecution may prove that the defendant participated or continued to participate in the assault realising that there was a real risk the other may, in the course of the joint assault, kick V to the head with intent to do him really serious harm.

I have prepared a note which will enable you to approach these issues sequentially in order to arrive at your verdicts. Let us read it together.

Illustration – Route to Verdict

Please apply the following questions to the case of each defendant in turn. Answer the first question and proceed as directed.

Question 1

Did the defendant take part with his co-accused in an unlawful assault on V intending to cause some bodily or realising that some bodily injury may be caused?

Admitted. Go to question 2

Question 2

Did V, in consequence of the joint assault, suffer really serious injury?

Admitted. Go to question 3

Question 3

Did the defendant **either**

- (i) kick V to the head intending that V should suffer really serious injury; **or**
- (ii) take part in the attack realising that there was a real risk that his co-accused might kick V to the head with intent to cause him really serious injury; **or**
- (iii) continue to take part in the attack realising that his co-accused was kicking V to the head and might be doing so with intent to cause V really serious harm?

If you are sure of either (i) or (ii) or (iii), verdict guilty count 1, causing grievous bodily harm with intent

If you are not sure of either (i) or (ii) or (iii), verdict guilty count 2 ¹¹⁰

(ii) Defendant Not Present Assisting Another to Commit the Offence

This situation will arise when the prosecution case is that the defendant facilitated the offence with intent but did not otherwise take part in it, for example, by the supply of a weapon, or a car, or information, with foreknowledge of the intended offence.

The jury should be directed that the prosecution must prove that

- the offence was committed,
- the defendant had foreknowledge of the offence,
- the defendant intended to assist the offence and
- the defendant in fact assisted the offence.

However, foreknowledge does not have to be complete provided that the defendant knew of the kind of offence in contemplation, that he intended to assist, and that he did assist.¹¹¹

See also General Introduction paragraphs 12-15 above

Footnotes

¹¹⁰ If one of the defendants may have injured V in a manner fundamentally different from that contemplated by the joint enterprise, e.g. by taking a house brick and striking V over the head with it, a further step would be required. See (v) Joint Enterprise below.

¹¹¹ *Maxwell* [1978] 1 WLR 1363, 68 Cr App R 128; *R v. Bryce* [2004] 2 Cr App R 35, [2004] EWCA Crim 1231

Illustration – supply of weapon – the elements of secondary liability

The defendant accepts that he supplied a.....to..... on.....

The evidence is that..... was used by..... to commit an offence of.....on.....

The prosecution case is that the.... was supplied by the defendant to assist the commission of the offence by....; that being so, the defendant is guilty of the offence just as were those who set out to commit it.

In order to prove that the defendant is guilty the prosecution must prove that (1) the offence was committed, (2) it was assisted by use of a.....and (3) the defendant supplied the....knowing that others intended to use it for that offence or for an offence of the same kind. It is not necessary for the prosecution to prove that the defendant knew of the date on which, or the precise circumstances in which, the.....would be used or the precise crime which was to be committed. It is enough for the prosecution to prove that he intentionally assisted others to commit a crime of the kind which they then went on to commit.

(iii) Presence at and Encouragement of Another to Commit the Offence

Intentional encouragement to others at the scene to commit the offence renders the defendant guilty of the offence.¹¹²

Mere voluntary presence at the scene of a crime is not enough to prove complicity but deliberate and unexplained presence may give rise to an inference of an intention to encourage it.¹¹³

If the defendant is present intending by his presence to encourage and is actually, by his presence, encouraging others to commit the offence then he is guilty.¹¹⁴

Illustration – intentional encouragement by words or conduct

The defendant admits being present at the commission of the offence charged but his case is that he took no part in it. It is not an offence merely to be present when a crime is committed; nor, indeed, in the present circumstances, to stand by without taking steps to prevent it.¹¹⁵ The prosecution case is that the defendant did take part by encouraging the others. He encouraged them by....

The prosecution must prove (1) the defendant's presence at the scene, (2) his intention, by...., to encourage the others to commit the offence and (3) that he did in fact encourage the others to commit the offence..

Footnotes

¹¹² *R v. Clarkson* [1971] 1 WLR 1402, [1971] 55 Cr App R 445

¹¹³ *R v. Jones and Mirrless* 65 Cr App R 250; *R v. Allan* [1965] 1 QB 130, 47 Cr App R 243; *R v. Clarkson* (*supra*)

¹¹⁴ *R v. Coney* (1882) 8 QBD 534; *Wilcox v. Jeffrey* [1951] 1 All ER 464

¹¹⁵ *Contra*, when the defendant is present in pursuance of a common design to commit the offence. To avoid responsibility for P's act committed in the course of the joint enterprise he must make an *effective* withdrawal of support and participation: *Becerra and Cooper* [1976] 62 Cr App R 212 at page 219

Illustration – intentional encouragement by presence alone

The defendant admits being present at the commission of the offence charged but his case is that he took no part in it. It is not an offence merely to be present when a crime is committed; nor, indeed, in the present circumstances, to stand by without taking steps to prevent it. The prosecution case is that he did take part by encouraging the others with his presence.

The prosecution must prove (1) the defendant's presence at the scene, (2) his intention, by his presence, to encourage the others to commit the offence and (3) that he did, by his presence, encourage the others to commit the offence.

(iv) Counselling or Procuring (Directing or Enabling) the Offence

1. The terms 'directing or enabling' are also used since 'procuring' by a secondary offender does not necessarily imply a common design with the principal. Secondary liability will not necessarily be 'derived' from the offence committed by P. A 'no fault' offence may be 'procured' in the sense that the defendant's conduct was calculated to bring the offence about.¹¹⁶
2. If D *directs* P to commit an offence, and P commits the offence as ordered, D is also guilty of the offence as an accessory.¹¹⁷ The direction of P by D may be consensual, or it may be the result of pressure or duress.
3. In a case of *direction*, if the harm D directed was achieved, the fact that the means used by P to achieve it was different from that contemplated by D does not provide D with a defence (e.g. if a killing is ordered by shooting, the defendant is guilty of a murder caused by stabbing in the course of carrying out that order).
4. Where, however, the acts committed went beyond what the defendant directed it is necessary to examine whether they were nevertheless within the scope of the direction. It is suggested that upon an application of the approach of the Court of Appeal in *Reardon*¹¹⁸, it is permissible to equate the 'scope of the direction' with the 'scope of the common purpose' between D and P, since the principle being applied in both cases is one of 'parasitic liability'. P's acts will be within the scope of D's direction if D realised there was a real possibility that when carrying out those directions P would act as he did.¹¹⁹ If, however, P's acts were fundamentally different from those directed it is unlikely that the prosecution will prove his foresight of those acts.¹²⁰

Footnotes

¹¹⁶ *Att.-Gen's Reference (No 1 of 1975)* (*supra*)

¹¹⁷ *Att.-Gen's Reference (No 1 of 1975)* [1975] QB 773; *Chan Wing-Siu v. The Queen* [1985] AC 165 (PC), at p. 175, per Sir Robin Cooke; *Brown and Isaac v. The State* [2003] UKPC 10, para 8, per Lord Hoffman.

¹¹⁸ See *General Introduction* paragraphs 8-15 above

¹¹⁹ *R v. Hyde* [1991] 1 QB 134; *R v. Rahman* [2008] 3 WLR 264; [2008] UKHL 45

¹²⁰ *R v. Anderson, R v. Morris* [1966] 2 QB 110; *R v. Smith (Wesley)* [1963] 1 WLR 1200; *R v. Gamble and Others* [1989] NI 268 (but see doubts expressed by the majority in *Rahman* [2008] UKHL 45 as to the correctness of the decision in *Gamble* on its facts)

5. In the case of crimes requiring a specific intent the identity of the offence committed by D is regulated by his own state of mind, but the prosecution does not have to prove that D himself possessed the specific intent, only that D foresaw *the real possibility* that P would, when carrying out his order, act with that specific intent.¹²¹ If, for example, the defendant ordered a beating and the victim died from the beating delivered, he is guilty of murder only if he had the intent required for murder or he realised that the beating would or might be carried out with the intent required for murder. If not, he is guilty of manslaughter.¹²²
6. ‘Counselling’ embraces advising, soliciting and encouraging. It is not necessary that D’s counselling caused the offence, but it is necessary that the act counselled was performed within the scope of the authority D had bestowed upon P. In *Calhaem*¹²³ Parker LJ said:
- “We must therefore approach the question raised on the basis that we should give to the word “counsel” its ordinary meaning, which is, as the judge said, “advise,” “solicit,” or something of that sort. There is no implication in the word itself that there should be any causal connection between the counselling and the offence. It is true that, unlike the offence of incitement at common law, the actual offence must have been committed, and committed by the person counselled. To this extent there must clearly be, first, contact between the parties, and, secondly, a connection between the counselling and the murder. Equally, the act done must, we think, be done within the scope of the authority or advice, and not, for example, accidentally when the mind of the final murderer did not go with his actions. For example, if the principal offender happened to be involved in a football riot in the course of which he laid about him with a weapon of some sort and killed someone who, unknown to him, was the person whom he had been counselled to kill, he would not, in our view, have been acting within the scope of his authority; he would have been acting entirely outside it, albeit what he had done was what he had been counselled to do.”
7. As with ‘procuring’, it is arguable that there is, in principle, no reason why the test for ‘parasitic liability’ should not apply to counselling P to commit an offence, where P goes beyond the acts which D counselled. The questions for the jury will be (i) whether the act done by P was within scope of the acts counselled by D (D counselled P knowing there was a real possibility of), and (2) whether D had the intention required or knew, when counselling the act, that there was a real possibility that P would act with the specific intent required.

Footnotes

¹²¹ *R v. Powell, R v. English* [1999] AC 1

¹²² *R v. Gilmour* [2000] 2 Cr App R 407, [2000] NICA 10; *Stewart* [1995] 3 All ER 159. See also the reference to *Reardon* [1999] Crim LR 392 and to the commentary of Professor Smith at *General Introduction* paragraphs 12-15 above.

¹²³ [1985] QB 808, [1985] 81 Cr App R 131

Illustration – prosecution case D hired P1 and P2 to cause V really serious harm – D’s case is that he hired them to do V some physical harm – fundamentally different act – alternative offences

On.....two men called at the home of the complainant, V. They subjected him to a severe beating with baseball bats. They left V with broken cheekbones and a multitude of bruises. It is accepted by the defence that those injuries constituted really serious bodily harm committed with intent to do really serious bodily harm.

One of those men was P1. On....P1 pleaded guilty to the offence of causing grievous bodily harm with intent. He has given evidence for the prosecution. He told you that he and P2 were hired by the defendant to give the complainant “the hiding of his life”.

The defendant admits hiring P1 and P2 to assault V but only to “soften him up”. He says he had no idea they were going to use baseball bats and did not intend the complainant to suffer serious injury.

A defendant who hires others to commit an offence is guilty of the offence if they go on to commit it. Here the defendant says P1 and P2 did not commit the offence he ordered but a more serious offence. Your task is to decide whether the prosecution has proved that the defendant committed one of the offences charged as alternatives in the indictment. There are three counts in the indictment, count 1, causing grievous bodily harm with intent to do grievous bodily harm; count 2, inflicting grievous bodily harm; and count 3, assault occasioning actual bodily harm. [Explain]

You will need to consider (1) the scope of the agreement reached between the defendant, P1 and P2, (2) the defendant’s awareness of the possible consequences of that agreement, and (3) the defendant’s state of mind when he gave his directions.

You must first decide whether you are sure the defendant hired P1 and P2 to do really serious bodily harm to V. If you are sure he did, then it does not matter whether the defendant realised they would use baseball bats to achieve it. He is guilty of the offence charged in count 1, causing grievous bodily harm with intent, because what he ordered, and therefore intended, was achieved by P1 and P2 as ordered. Your verdict would be guilty of count 1 and you need go no further.

If you are not sure that the defendant ordered P1 and P2 to cause V really serious harm, then you must consider whether the prosecution has proved that what was done by P1 and P2 was within the scope of the agreement the defendant made with them. The prosecution must prove that the defendant realised that in carrying out his orders P1 and P2 might use baseball bats or similar weapons. In deciding what was in the defendant’s mind you are entitled to compare what the defendant ordered with what P1 and P2 did.

Let us look at the first question: Was the use of baseball bats an act essentially different in quality from or essentially the same as what the defendant ordered? The prosecution points out that the defendant was perfectly prepared for P1 and P2 to use their fists and feet on the complainant. The use of another form of blunt instrument to ‘soften him up’ did not depart from the essential quality of what was agreed. The defence argues that these were actions of a completely different character from those ordered. You must resolve this issue. Clearly, if you think P1 and P2 may have gone well beyond what the defendant ordered, the less likely it is that the defendant realised they might act in that way. If, on the other hand, you are sure that what was ordered and what took place were essentially the same, the more likely it is, you may think, that the defendant realised that P1 and P2 might act as they did when they carried out his orders.

You must decide whether the defendant realised that, in carrying out his orders, P1 and P2 might resort to violence with weapons such as baseball bats.

If you are sure the defendant realised that weapons such as baseball bats might be used to carry out his orders, the violence done was within the scope of the defendant's orders to P1 and P2.

However, he would be guilty of count 1 only if he realised that P1 and P2 would or might act with intent to cause V really serious bodily harm. If you are sure he did your verdict would be guilty of count 1. If you are not sure he did, your verdict would be not guilty of count 1 but guilty of count 2.

If, on the other hand, you are not sure that the defendant realised the possibility that weapons such as baseball bats may be used, your verdict would be not guilty of count 2.

If you find the defendant not guilty of count 1 and count 2 it is conceded by the defence that your verdict upon count 3 will be guilty. The defendant accepts that he hired P1 and P2 to commit the offence of assault causing actual bodily harm. The defendant would therefore be responsible for what he ordered but not for consequences which resulted from violence outside the scope of his directions.

I have prepared a note which explains the sequence in which you should consider these questions before arriving at your verdict. Let us read it together.

Illustration – Route to Verdict

Please answer question 1 and proceed as directed

Question 1

Are you sure P1 and P2 caused and intended to cause really serious bodily harm to V?

Admitted. Proceed to question 2

Question 2

Are you sure that the defendant ordered P1 and P2 to cause really serious harm to V?

If you are sure he did, verdict guilty count 1 (causing grievous bodily harm with intent) and proceed no further

If you are not sure he did, go to question 3

Question 3

Are you sure that the use of baseball bats was within the scope of the directions given by the defendant to P1 and P2? See Note below

If you are sure the use of baseball bats was within the scope of the agreement, go to question 4

If you are not sure the use of baseball bats was within the scope of the agreement, go to question 5

Question 4

Are you sure that when the defendant hired P1 and P2 he realised that they may attack V intending to cause him really serious harm?

If you are sure he did, verdict guilty count 1 (causing grievous bodily harm with intent) and proceed no further

If you are not sure he did, verdict not guilty count 1 but guilty count 2 (inflicting grievous bodily harm) and proceed no further

Question 5

Are you sure that the defendant hired P1 and P2 to cause and intended them to cause V some physical harm?

Admitted. Verdict guilty count 3 (assault occasioning actual bodily harm)

Note:

The use of baseball bats was within the scope of the defendant's directions to P1 and P2 only if you are sure that the defendant realised when he gave his directions to P1 and P2 that weapons such as baseball bats might well be used to carry them out.

(v) Further Offence Committed in the Course of a Joint Enterprise

1. If the defendant (D) is engaged with another (P) in a joint enterprise to commit offence X, and P, in the course of the joint enterprise, commits the further offence Y, D may be liable also for offence Y. Questions which arise are (1) whether the acts done were within the scope of the joint enterprise, (2) whether the acts, while within the scope of the joint enterprise, were done with an intention within the contemplation of the defendant.
2. If the common purpose of the enterprise was achieved (i.e. offence X) it does not matter that it was achieved by a means which was outside the contemplation of the defendant (e.g. where the purpose of the joint enterprise was to kill a victim by shooting and one of the parties took out a knife and stabbed the victim to death, all are guilty of murder, because the common purpose was a killing).¹²⁴ The reason is that P and D accomplished the purpose they set out to achieve.
3. Where one party to the joint enterprise (P) acted in a manner which exceeded the common purpose, the issue for the jury is whether his act was nevertheless within the scope of the joint enterprise, and, therefore, authorised by the defendant (D), or the act was foreseen by D as a real possibility when he embarked upon the joint enterprise. D is liable for P's act if he realised it was a real possibility that, in furtherance of the joint enterprise, one of the parties to it would act as he did, whether the defendant personally wished it or not. If, however, P's acts were fundamentally different from those directed it is unlikely that the prosecution will prove his foresight of those acts.¹²⁵

Footnotes

¹²⁴ *Brown and Isaac v. The State* [2003] UKPC 10, para 13

¹²⁵ *R v. Anderson, R v. Morris* [1966] 2 QB 110; *R v. Smith (Wesley)* [1963] 1 WLR 1200; *R v. Gamble and Others* [1989] NI 268 (but see doubts expressed by the majority in *Rahman* [2008] UKHL 45 as to the correctness of the decision in *Gamble* on its facts)

4. Where a crime of specific intent is charged (e.g. murder or causing grievous bodily harm with intent) D's responsibility depends upon the answer to the following question: Did D participate or continue to participate in the joint enterprise realising there was a real possibility that another party to the joint enterprise would act as he did with specific intent?
5. Where the defendant realised that one of parties to the joint enterprise may, in the course of the joint enterprise, use a lethal weapon, the jury may readily draw the inference that he was also aware that he might use it with specific intent (e.g. (1) where in the course of a robbery P shot the cashier, D will be guilty if he knew that P carried a loaded shotgun and of a real possibility that P would use it, if necessary, with intent to kill or to cause really serious injury, even if P and D had agreed that it would only be used to threaten; (2) where, in the course of a joint venture to do really serious injury to V, P produced a knife and stabbed V to death, D would be guilty of murder if he knew there was a real possibility that P was in possession of a knife, and might use a knife to stab V with intent to kill or to cause really serious injury, even if D had no intention that a knife should be produced or used).¹²⁶
6. If the jury is sure that the act committed by P was within the scope of the joint enterprise, but not sure that the defendant realised that the act might be accompanied by the specific intent, the defendant is not guilty of the offence of specific intent charged, but may be guilty of a lesser alternative offence (e.g. inflicting grievous bodily harm or manslaughter), because the defendant remains liable for acts which were within the scope of the joint enterprise.¹²⁷
7. If the act was, in the view of the jury, fundamentally different from those contemplated by the defendant, so that the defendant was unaware of the possibility that P may act as he did, it was outside the scope of the joint enterprise and the defendant will not be responsible for the consequences of it (e.g. where P, D1 and D2 attack V1 and V2 with sticks with intent to cause really serious harm, and P unexpectedly produces a knife and kills V1 with intent to cause really serious harm, D1 and D2 may not be guilty of murder or manslaughter, depending on the jury's view whether stabbing was a fundamentally different act, even though each of them set out with the intent required for murder).¹²⁸
8. Where, however, the defendant continued to participate in the joint venture after he realised that another party to the joint enterprise would or might act as he did with the requisite intent, he is responsible for the outcome (e.g. if during a fight P unexpectedly produced a knife and threatened to kill V with it and D, aware of the threat, continued his assault on V, D would be guilty of murder if P carried out his threat with intent to kill or to cause really serious injury, even if D personally did not have the intent required for murder).¹²⁹
9. A defendant may *exceptionally* escape the consequences of the joint enterprise if he withdrew from it once he realised the risk of an unintended outcome through the actions of P.¹³⁰ His withdrawal must be unequivocal and effective.¹³¹

Footnotes

¹²⁶ *R v. Rahman* [2008] 3 WLR 264; [2008] UKHL 45; *R v. Powell, R v. English* [1999] 1 AC 1

¹²⁷ *Stewart* [1995] 3 All ER 159; *Gilmour* [2000] 2 Cr App R 407; [2000] NICA 10

¹²⁸ See, however, the speech of Lord Hutton in *English* [1997] 3 WLR 959 at page 981; Lord Brown in *Rahman* [2008] 3 WLR 264; [2008] UKHL 45 at § 68; see also *R v. Yemoh and Others* [2009] EWCA Crim 930 for the application of the test to manslaughter.

¹²⁹ *R v. Rahman* [2008] 3 WLR 264; [2008] UKHL 45

¹³⁰ *Mitchell* [1990] Crim LR 496

¹³¹ *Bryce* [2004] 2 Cr App R 35; *Robinson* [2000] Archbold News 2 (same principle applies whether the offence was spontaneous or planned); *O'Flaherty* [2004] 2 Cr App R 315; *Gallant* [2008] EWCA Crim 1111; *Becerra and Cooper* [1976] 62 Cr App R 212

Illustration – prosecution case of joint enterprise (common purpose) to kill V – D admits common purpose to cause really serious harm – P stabs and kills V – whether the act of P was committed within the scope of the common purpose joined by D or was a fundamentally different act – whether D knew of a real possibility that P would use a knife with the intent required for murder

The prosecution case is that the defendant, with others, set out to kill the deceased. That this was their joint intention can be inferred from their actions observed by the witnesses. They were seen advancing towards their victim, V, carrying an assortment of weapons, including sticks, a baseball bat and at least one knife, perhaps two. Members of the group were chanting words to the effect that V was a dead man. During the attack which followed, one of them thrust a knife into V's chest causing a wound from which he died within minutes. The evidence does not establish who inflicted the wound but the prosecution accepts it was not this defendant. It is common ground that whoever inflicted that knife wound intended either to kill V or to cause him really serious bodily injury, and was therefore guilty of murder.

The defendant says that his intention was to attack V with the stick he was carrying. He admits that he did cause a serious injury to V's head with intent to cause really serious harm. However, he says he was unaware that anyone was carrying a knife, had no intention that anyone should use a knife and did not appreciate that anyone might be intending to use a knife. No-one was chanting death threats towards V as far as he was aware and he would not have joined a common purpose to kill.

The defendant therefore admits he joined an unlawful criminal enterprise to attack V but denies that he is responsible for V's death.

The first issue between the prosecution and the defence for you to resolve is whether the defendant participated in an attack on the deceased intending that V should be killed. If the defendant participated in a joint attack whose common purpose was to kill he is guilty of murder, whether or not he was the man who delivered the fatal wound, and whether or not he thought a knife might be used. Your verdict would be guilty of murder and you need proceed no further.

If you are not sure that the defendant shared a common purpose to kill, then you must next consider whether wounding with a knife was, nevertheless, within the scope of the criminal enterprise in which he took part.

The use of the knife was within the scope of the criminal enterprise in which the defendant participated if the defendant realised when he joined in that there was a real possibility that a knife would be used by one of the others to wound V.

Only if you are sure that the act of wounding V was within the scope of the criminal enterprise in which the defendant participated could you find the defendant guilty of count 1 (murder) or count 2 (manslaughter).

The defendant is guilty of murder if wounding with a knife was within the scope of the criminal enterprise he joined and the defendant realised there was a real possibility that V would be stabbed by one of the group with intent to cause really serious harm or death. If you are sure that wounding was within the scope of the enterprise, but you are not sure the defendant realised one of the group would or might act with intent to cause really serious harm or death, the defendant is not guilty of murder but guilty of manslaughter.

If you are not sure that wounding with a knife was within the scope of the criminal enterprise the defendant joined he is not guilty of murder and not guilty of manslaughter. In that event you would turn to count 3.

Count 3 encompasses the defendant's admission that by his own act he caused a serious injury with intent to do V really serious bodily harm.

I have prepared a note which explains the sequence in which you should consider these questions before arriving at your verdict. Let us read it together.

Illustration – Route to Verdict

Please answer question 1 first and proceed as directed

Question 1

Did the defendant take part in the attack on V sharing a common purpose to kill him?

If you are sure he did, verdict guilty count 1 (murder) and proceed no further

If you are not sure, go to question 2

Question 2

Was the use of a knife to wound V within the scope of the criminal enterprise joined by the defendant? See Note below

If you are sure the use of the knife was within the scope of the criminal enterprise joined by D, go to question 3

If you are not sure the use of the knife was within the scope of the criminal enterprise joined by D, go to question 4

Question 3

Did the defendant realise when he took part in the attack on V that there was a real possibility one of the other attackers would stab V with intent to kill or to cause really serious injury?

If you are sure he did realise it, verdict guilty of count 1 (murder) and proceed no further

If you are not sure he did, verdict not guilty count 1 (murder) but guilty count 2 (manslaughter)

Question 4

Did the defendant cause really serious injury to V with a stick intending to cause him really serious injury?

The defendant admits causing really serious injury with a stick intending to cause really serious injury. If you have found the defendant not guilty of count 1 (murder) and not guilty count 2 (manslaughter) your verdict will be guilty count 3 (causing grievous bodily harm with intent).

Note:

The act of stabbing was within the scope of the criminal enterprise joined by the defendant only if you are sure that the defendant realised when he joined in, or continued to join in, that one of the other participants might well use a knife to stab V.

Sources

Footnotes and Archbold 18-7/32; Blackstone A5.1/15; Smith & Hogan 12 ed. Chapter 8

As to whether it is necessary to direct the jury both as to identification of a common purpose to kill and the foresight of another's act and intention, see Rahman [2008] 3 WLR 264 at para 63, per Lord Brown. (Note, however, that if the common purpose to kill was achieved the prosecution does not have to prove foresight of means)

Note

The Serious Crime Act 2007 creates new statutory offences of encouraging or assisting crime. It abolished and replaced the common law offence of incitement. Sections 44-67 came into force on 1 October 2008. The prosecution does not have to prove that the offence encouraged or assisted was committed. Where the allegation is that the defendant was complicit in a crime committed it is likely that the prosecution will continue to charge the full offence- See Archbold 33-92/118; Blackstone A6.3/32.

(9) Causation

Introduction

1. “Result” offences sometimes create problems of causation to be resolved by the jury. The judge may need to give careful consideration to the questions (1) what the prosecution needs to prove, (2) whether it is necessary to provide the jury with an explanation of causation and, if so, (3) how to explain the concept of causation in the context of the facts of the case. As long ago as 1956 Lord Parker CJ said:¹³²

“There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation.”

2. In its simplest form the test for causation is whether “but for” the defendant’s act the result would have happened but such a test might not permit concurrent causes and might, inappropriately, impose liability for an unforeseeable change to consequences.

General Rule

3. There may be more than one cause. The prosecution must usually establish that the defendant’s act was a substantial cause of the “result”, by which is meant a more than minimal cause.¹³³ In 2002 a Law Commission working party, making proposals for codifying the concept of causation in the criminal law, settled on the description “made a substantial and operative contribution to” which, it is suggested, is an elegant and accurate synonym for “caused”.
4. The fact that the result was unusual or unexpected in consequence of some unanticipated decision of the victim will not necessarily assist the defendant. In *Blaue*¹³⁴, for example, the victim of a wounding refused a blood transfusion which would have saved her life. Lawton LJ said:

“It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.”¹³⁵

Unlawful Act Manslaughter and Foreseeable Harm

5. In cases of unlawful act manslaughter the co-existence of the unlawful act and the death of the victim will not be enough unless some harm was a foreseeable risk on the facts as they were known to the defendant. In *Church*¹³⁶ the defendant inflicted grievous injuries. His evidence was that in panic and believing his victim to be still alive, he threw her body into a river. As Edmund Davis J explained:

Footnotes

¹³² *Smith* [1956] 2 QB 35 (Court Martial Appeal Court) at page 43

¹³³ *Hennigan* [1971] 3 All ER 133

¹³⁴ [1975] 1 WLR 1411

¹³⁵ Compare the “flight” cases below

¹³⁶ [1966] 1 QB 59

“...an unlawful act causing death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting there from, albeit not serious harm.”

The defendant was convicted of manslaughter. The court held that although the jury had been misdirected that the defendant’s belief that his victim was alive was irrelevant, a conviction for at least manslaughter had been inevitable because either (1) the victim was dead when she was thrown into the river and the injuries the accused had already inflicted made a significant contribution to death or (2) his victim was alive and his act of throwing her into the river was an unlawful and dangerous act which any reasonable person would have realised would risk some harm.

6. The Court of Appeal made plain in *Dawson*¹³⁷ and *Carey*¹³⁸ that it is not the foreseeability of the risk of *any* harm which will be sufficient to satisfy the test in a case of manslaughter. In *Dawson* a garage attendant aged 60 was the victim of an attempted robbery. He undoubtedly suffered an emotional reaction but was subjected to no violence. He died from a heart attack caused by the effect of stress upon an already severely diseased heart from which he was in constant danger of succumbing. The bystander would have had no reason to suspect that a heart attack might be the result of the stress the victim suffered. In *Carey* the deceased was subjected to direct physical assault during an affray but, having run away from the scene,¹³⁹ suffered a dysrhythmia of the heart to which she was, unknown to anyone, susceptible, from which she collapsed and died. In both cases the court held that the death was not “caused” by the unlawful act. Whether the act was objectively dangerous was to be judged according to the circumstances as they were known to the defendant. Accordingly, unless there were circumstances which would have given the bystander foresight that the defendant’s unlawful act might cause relevant harm, death will not have been “caused” by an unlawful and dangerous act. In *Watson*¹⁴⁰, on the other hand, the victim of a burglary could be seen to be a frail 87 year old man. Lord Lane CJ said:¹⁴¹

“The judge clearly took the view that the jury were entitled to ascribe to the bystander the knowledge which the appellant gained during the whole of his stay in the house and so directed them. Was this a misdirection? In our judgment it was not. The unlawful act in the present circumstances comprised the whole of the burglarious intrusion and did not come to an end upon the appellant’s foot crossing the threshold or windowsill. That being so, the appellant (and therefore the bystander) during the course of the unlawful act, must have become aware of Mr. Moyler’s frailty and approximate age, and the judge’s directions were accordingly correct. We are supported in this view by the fact that no one at the trial seems to have thought otherwise.”

Footnotes

¹³⁷ [1985] 81 Cr App R 150

¹³⁸ [2006] EWCA Crim 604

¹³⁹ Note: the prosecution accepted that the victim was not “escaping” from the threat of further violence

¹⁴⁰ [1989] 1 WLR 684

¹⁴¹ At page 686-687

Novus Actus Interveniens and Remoteness

7. Most problems of causation concern the application of the principle *novus actus interveniens*, or new and intervening act. The Court of Appeal has, on more than one occasion, advised against entering into an exposition of the law concerning an intervening act when it is plain that there was more than one cause and the issue is whether the defendant made a more than minimal contribution to the result.¹⁴²
8. Subject to the existence of an *Empress Car Co* duty (as to which see below), the defendant will be relieved of liability for the result if the intervening act or event becomes the dominating operative cause, such as:¹⁴³
- (1) An extraordinary natural event or one which is not reasonably foreseeable (e.g. earthquake);
 - (2) A third party's free, deliberate and informed act (c.f. *Gamble* and *Latif* below);
 - (3) A third party's act which is not reasonably foreseeable (c.f. *Pagett*, *G* and the medical intervention cases below);
 - (4) The victim's free, deliberate and informed act (*Kennedy (No 2)* below, but compare *Blaue* above where the wound remained the operative cause);
 - (5) The victim responded to the defendant's act in a way which was not reasonably foreseeable (c.f. *G* and *Lewis* below).
9. In *Latif*¹⁴⁴ the defendants were alleged drugs importers. Customs officers seized in Pakistan heroin intended for the defendants in the UK. The officers conveyed the drug to UK where the defendants took delivery. The defendant was not guilty of the importation. Lord Steyn said:¹⁴⁵

"The problem, as Sir John Smith pointed out in the note in the Criminal Law Review, is one of causation. Review, is one of causation. The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him is held to relieve the first actor of criminal responsibility: see *Hart and Honore, Causation in (1995)*, pp.13– 15. For example, if a thief had stolen the heroin after Shahzad delivered it to Honi, and *the Law*, 2nd

Footnotes

¹⁴² In *Pagett* [1983] 76 Cr App R 279 at page 288 Robert Goff LJ said: "In cases of homicide...Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. It is right to observe...that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact, that the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a *causa sine qua non* of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention...has often been described by lawyers as a *novus actus interveniens*. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, **but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.**"

¹⁴³ C.f. Smith & Hogan 12 ed. page 78

¹⁴⁴ [1996] 1 WLR 104

¹⁴⁵ At page 115

ed.(1985), pp. 326 et seq.; *Blackstone's Criminal Practice* imported it into the United Kingdom, the chain of causation would plainly have been broken. The general principle must also be applicable to the role of the customs officers in this case. They acted in full knowledge of the content of the packages. They did not act in concert with Shahzad. They acted deliberately for their own purposes whatever those might have been. In my view consistency and legal principle do not permit us to create an exception to the general principle of causation to take care of the particular problem thrown up by this case. In my view the prosecution's argument elides the real problem of causation and provides no way of solving it."

The defendants did not, however, escape conviction because they were charged under section 170(2) Customs and Excise Management Act 1979 by which the defendant is guilty when he evades or attempts to evade the duty. There was no doubt that they had attempted to evade the duty.¹⁴⁶

Acts of Self Preservation Causing Injury or Death

10. In *Pagett*¹⁴⁷ the defendant advanced towards armed police officers in the darkness of a stairwell using his girlfriend, whom he had taken hostage, as a shield. He fired a shot from a shotgun which produced the instinctive and self-defensive response of shots from the police officers. The girlfriend was killed by shots fired by the officers. Robert Goff LJ, recognising the analogy with the "escape" cases, said:

"There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a *novus actus interveniens*. If authority is needed for this almost self-evident proposition, it is to be found in such cases as *Pitts* (1842) C. & M. 284, and *Curley* (1909) 2 Cr.App.R. 96 . In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgment, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party. Of course, it does not necessarily follow that the accused will be guilty of the murder, or even of the manslaughter, of the third party; though in the majority of cases he is likely to be guilty at least of manslaughter. Whether he is guilty of murder or manslaughter will depend upon the question whether all the ingredients of the relevant offence have been proved; in particular, on a charge of murder, it will be necessary that the accused had the necessary intent..."

Thus, the defendant's unlawful and dangerous acts of (1) the assault upon his girlfriend by forcing her to act as a shield and (2) firing a shot at the police officers created a foreseeable risk of relevant harm and were a significant cause of the girlfriend's death.

Footnotes

¹⁴⁶ C.f. *Jakeman* [1983] 76 Cr App R 223 in which the defendant had booked her luggage containing 21 kilos cannabis from Accra to London via Rome. When her connecting flight from Rome to London was cancelled, she and her luggage were flown to Paris. She failed to claim her luggage and travelled on to London without it. The carriers forwarded the luggage to London. The defendant was charged under section 3(2) Misuse of Drugs Act 1971 with evasion of the prohibition on importation of a controlled drug. The Court of Appeal held that the action of the carrier was not a new act but the performance of her act by an innocent agent.

¹⁴⁷ [1983] 76 Cr App R 279

11. The trial judge had directed the jury that if they found these facts proved the defendant would in law have caused the death. The judge should have left the issue to the jury. Robert Goff LJ continued:

“The principles which we have stated are principles of law. This is plain from, for example, the case of *Pitts* (1842) C. & M. 284, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called *novus actus interveniens*, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, *Towers* (1874) 12 Cox C.C. 530, the accused struck a woman; she screamed loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from convulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact.”

Nevertheless, the verdict was undisturbed because the judge’s directions had been somewhat more generous than they need have been.

12. If the defendant’s unlawful act generates in the victim a reaction which results in the victim’s injury or death the question for the jury will be whether the victim’s reaction was a foreseeable consequence of the defendant’s unlawful act. In *Williams*¹⁴⁸ Stuart-Smith LJ explained:

“It is plain that in fatal cases there are two requirements. The first, as in non-fatal cases, relates to the deceased’s conduct which would be something that a reasonable and responsible man in the assailant’s shoes would have foreseen. The second, which applies only in fatal cases, relates to the quality of the unlawful act which must be such that all sober and reasonable people would inevitably recognise must subject the other person to some harm resulting therefrom, albeit not serious harm. It should be noted that the headnote is inaccurate and tends to confuse these two limbs.

The harm must be physical harm. Where the unlawful act is a battery, there is no difficulty with the second ingredient. Where, however, the unlawful act is merely a threat unaccompanied and not preceded by any actual violence, the position may be more difficult. In the case of a life-threatening assault, such as pointing a gun or knife at the victim, all sober and reasonable people may well anticipate some physical injury through shock to the victim, as for example in *Reg. v. Dawson* (1985) 81 Cr.App.R. 150 where the victim died of a heart attack following a robbery in which two of the appellants had been masked, armed with a replica gun and pickaxe handles. But the nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased’s conduct was proportionate to the threat; that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a *novus actus interveniens* and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing.”

Footnotes

¹⁴⁸ [1992] 1 WLR 380

13. In *Lewis*¹⁴⁹ the deceased was chased by the appellant into the path of an oncoming car and suffered fatal injuries. The appellant was convicted of manslaughter. Upon the issue of causation the judge posed to the jury the question whether the prosecution had proved, so that were sure, that (1) by chasing the deceased the appellant had committed an unlawful act, (2) the deceased's flight was the result of the unlawful act, and (3) the deceased's flight into the road was at least one of the responses which might have been expected of the deceased in the circumstances. The directions were upheld. They correctly identified in non-legal terms the need for the prosecution to prove both that the appellant's unlawful act was the operative cause of the fatal collision and that the unlawful act created a foreseeable risk of relevant harm in the circumstances known to appellant at the time, and was therefore dangerous.

Death by Dangerous Driving

14. In the trial of offences of causing death by dangerous driving the bad driving of the defendant and of others may be concurrent causes of death. In *Hennigan*¹⁵⁰ the defendant overtook vehicles at speed. He regained his correct side of the road but in front of him to his nearside the deceased emerged from a side turning to turn left. The defendant was unable to avoid a collision which killed the deceased and his passenger. Lord Parker CJ made clear that the jury was not concerned with apportionment. It was enough if the dangerous driving of the defendant was a *real cause* of the death which was more than minimal.
15. In *Skelton*¹⁵¹ the driver of a lorry knew of the unsafe condition of its braking system. The brakes seized and the lorry came to rest in the nearside lane. Several following vehicles managed to avoid the obstruction but after about 12 minutes a lorry collided with the obstruction and the driver was killed. The question for the jury was whether the deceased's own negligence was a new and intervening cause. Sedley J, as he then was, delivering the judgment of the court, said:

"...the dangerous driving [of the stationary vehicle] must have played a part, not simply in creating the occasion of the fatal accident but in bringing it about."

16. In *Barnes*¹⁵² the defendant carried an unsafe load on his truck. A sofa worked loose, became detached and fell into the carriageway. The truck stopped a short distance further along the carriageway. A following motorcyclist managed to avoid the sofa but collided with the rear of the truck. Hallett LJ said:

"13. The jury was entitled to find that the appellant put other road users at risk by driving dangerously. He drove with a load which was insecure. Had he not done so the sofa would not have fallen off, and Mr Wildman would not have been forced to drive round it. He would not have been distracted by it or turned to warn others coming behind him. The appellant's car would not have been stopped in the carriageway and Mr Wildman would not have driven into the back of it. Whatever criticisms [counsel] could properly make of Mr Wildman's driving, in our judgment all those circumstances are such that it was open to the jury to find that his dangerous driving played more than a minimal role in bringing about the accident and the death."

Footnotes

¹⁴⁹ [2010] EWCA 151

¹⁵⁰ [1971] 3 All ER 133

¹⁵¹ [1995] Crim LR 635

¹⁵² [2008] EWCA Crim 2726; [2009] RTR 21

The trial judge had directed the jury as follows:

“Now the words ‘thereby caused the death’. You have to be sure the dangerous driving was a cause of death, not the **only** cause of death or the **main** cause of death, but a cause of death which was more than just trivial. This means you must be sure that not only the defendant’s dangerous driving created the circumstances of the fatal collision but it was an actual cause in bringing about the death of Mr Wildman. And the defence say here, you might be satisfied the defendant had created the circumstances of the collision but – and they say, and they recognise it is an unattractive argument, – and they say it is nonetheless right, – the only cause of death was Mr Wildman failing to keep a proper look-out. And if that is so, or may be so, I direct you to acquit.”

The Court held that while in some circumstances judges might have to give the jury further assistance upon the difference between bringing about the conditions in which death occurred and “causing” the death, the direction given by the judge was sufficient on the facts in *Barnes*.

17. The Court of Appeal gave consideration in *G*¹⁵³ to the question how the jury could be assisted with the concept of foreseeability where it was the defence case that a new act intervened. The defendant had driven into collision with another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction, one did not and a fatal accident occurred. The Court considered how the trial judge might best explain to the jury that the defendant caused the second and fatal collision if it was a foreseeable consequence of his driving. Hooper LJ concluded:

“We are of the view that the words “reasonably foreseeable”, whilst apt to describe for a lawyer the appropriate test, may need to be reworded to ease the task of a jury. We suggest that a jury could be told in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously, and were sure that his dangerous driving was more than a slight or trifling link to the death(s), then:

‘the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.’

The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it could be made clear to the jury that they are not concerned with what the defendant foresaw.”

Medical Intervention

18. Medical intervention is a foreseeable consequence of injury caused by the defendant’s violent unlawful act; so also is the possibility of ineffective or negligent medical treatment. In *Smith*¹⁵⁴ the deceased was injured by a bayonet during a fight. While being taken to the medical reception station the deceased was dropped twice. On arrival his condition was misdiagnosed and he was not given a blood transfusion. Nevertheless, the Courts Martial Appeal Court (Lord Parker CJ) held that the deceased’s death was caused by his stab wounds.

Footnotes

¹⁵³ [2009] EWCA Crim 2666 [report embargoed pending a re-trial]

¹⁵⁴ [1959] 2 QB 35

19. The facts of *Jordan*¹⁵⁵ were in this regard exceptional. The victim of a stabbing was taken to hospital where he died. The defendant was convicted of murder. However, the Court of Criminal Appeal admitted fresh medical evidence which came to light after the trial. Hallett J, giving the judgment of the court said:

“There were two things other than the wound which were stated by these two medical witnesses to have brought about death. The stab wound had penetrated the intestine in two places, but it was mainly healed at the time of death. With a view to preventing infection it was thought right to administer an antibiotic, terramycin.

It was agreed by the two additional witnesses that that was the proper course to take, and a proper dose was administered. Some people, however, are intolerant to terramycin, and Beaumont was one of those people. After the initial doses he developed diarrhoea, which was only properly attributable, in the opinion of those doctors, to the fact that the patient was intolerant to terramycin. Thereupon the administration of terramycin was stopped, but unfortunately the very next day the resumption of such administration was ordered by another doctor and it was recommenced the following day. The two doctors both take the same view about it. Dr. Simpson said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Mr. Blackburn agreed.

Other steps were taken which were also regarded by the doctors as wrong— namely, the intravenous introduction of wholly abnormal quantities of liquid far exceeding the output. As a result the lungs became waterlogged and pulmonary oedema was discovered. Mr. Blackburn said that he was not surprised to see that condition after the introduction of so much liquid, and that pulmonary oedema leads to bronchopneumonia as an inevitable sequel, and it was from bronchopneumonia that Beaumont died.

We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.”

20. In *Cheshire*¹⁵⁶ the deceased had, after emergency treatment, made a substantial recovery from the effect of bullet wounds when he developed difficulty with his breathing. Doctors failed to appreciate that he had developed a complication of a tracheotomy carried out as a necessary emergency procedure which restricted his breathing and he died. Beldam LJ said:

“In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the defendant was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the defendant caused the death of the deceased adding that the defendant’s acts need not be the sole cause or even the main cause of death it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the

Footnotes

¹⁵⁵ [1956] 40 Cr App R 152

¹⁵⁶ [1991] 1 WLR 844

defendant unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the defendant's acts can fairly be said to have made a significant contribution to the victim's death. We think the word "significant" conveys the necessary substance of a contribution made to the death which is more than negligible."

21. In *Malcherek*¹⁵⁷ the Court of Appeal had to consider an application to adduce fresh medical evidence to the effect that death had been caused not by the defendant's act but the treating physicians' inappropriate decision to withdraw life support. Lord Lane CJ explained the court's decision to refuse the application as follows:

"The reason is this. Nothing which any of the two or three medical men whose statements are before us could say would alter the fact that in each case the assailant's actions continued to be an operating cause of the death. Nothing the doctors could say would provide any ground for a jury coming to the conclusion that the assailant in either case might not have caused the death. The furthest to which their proposed evidence goes, as already stated, is to suggest, first, that the criteria or the confirmatory tests are not sufficiently stringent and, secondly, that in the present case they were in certain respects inadequately fulfilled or carried out. It is no part of this court's function in the present circumstances to pronounce upon this matter, nor was it a function of either of the juries at these trials. Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist — for example, circulation — are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death.

Although it is unnecessary to go further than that for the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient."

Defendant Assisting a Lawful Act Causing Death

22. The House of Lords, in *Kennedy (No 2)*¹⁵⁸ finally resolved the question whether a defendant who assisted the victim to inject a controlled drug committed the offence of manslaughter when the victim died from an overdose. When the victim by his "free, deliberate and informed act" chose to ingest a controlled drug he was committing no offence. It followed that a defendant who assisted him could not be guilty as a secondary party. Lord Bingham said:

Footnotes

¹⁵⁷ [1981] 1 WLR 690

¹⁵⁸ [2008] 1 AC 269 HL

"14 The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "Finis for Novus Actus?" [1989] CLJ 391, 392, Professor Glanville Williams wrote:

"I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."

In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart & Honoré wrote:

"The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."

This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial. "

He continued:

"17 In his article already cited Professor Glanville Williams pointed out, at p 398, that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a novus actus interveniens breaking the chain of causation:

"Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the novus actus principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, 'derivative' from that of the perpetrator."

18 This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant's first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in *R v Dias* [2002] 2 Cr App R 96, paras 21–24, and in *R v Rogers* [2003] 1 WLR 1374 and is now accepted. If the conduct of the deceased was not criminal he was not a principal offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him."

Statutory Context

23. Usually, there will be a direct cause and effect. However, a leading modern authority on causation is *Environment Agency v. Empress Car Co. (Abertillery) Ltd*¹⁵⁹ in which the House of Lords was considering the meaning of the word “causes” in section 85(1) in the Water Resources Act 1991. The section read:

“A person contravenes this section if he causes....any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.”

Empress Car Co stored diesel fuel in a tank at their yard adjoining the River Ebbw in Abertillery. Overnight someone mischievously opened the tap which caused the fuel to overflow and pollute the river. The question was whether the company had “caused” the fuel to enter the controlled waters. Notwithstanding the immediate and direct cause of the pollution was the deliberate act of a third party, the House held that the company had caused the pollution.

24. Although the decision in *Empress Car Co* has since been confined to its particular statutory context (environmental pollution), Lord Hoffman’s rationale for the meaning of the word “causation” received the subsequent endorsement of the House in *Kennedy (No 2)*¹⁶⁰. Lord Hoffman explained that before a decision could be reached as to what was required the court had to examine the scope intended by the “rule”.¹⁶¹

“Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. In *Stansbie v. Troman* the law imposed a duty which included having to take precautions against burglars.....What, therefore, is the nature of the duty imposed by section 85(1)? Does it include responsibility for acts of third parties or natural events and, if so, for any such acts or only some of them? This is a question of statutory construction, having regard to the policy of the Act. It is immediately clear that the liability imposed by the subsection is strict: it does not require mens rea in the sense of intention or negligence. Strict liability is imposed in the interests of protecting controlled waters from pollution. The offence is, as Lord Pearson said in *Alphacell Ltd. v. Woodward* [1972] A.C. 824, 842, “in the nature of a public nuisance.” *National Rivers Authority v. Yorkshire Water Services Ltd.* [1995] 1 A.C. 444 is a striking example of a case in which, in the context of a rule which did not apply strict liability, it would have been said that the defendant’s operation of the sewage plant did not cause the pollution but merely provided the occasion for pollution to be caused by the third party who discharged the iso-octanol, and in *Alphacell Ltd. v. Woodward* [1972] A.C. 824, 835, Lord Wilberforce said with reference to *Impress (Worcester) Ltd. v. Rees* [1971] 2 All E.R. 357, which I shall discuss later, that:

“it should not be regarded as a decision that in every case the act of a third party necessarily interrupts the chain of causation initiated by the person who owns or operates the installation or plant from which the flow took place.”

Clearly, therefore, the fact that a deliberate act of a third party caused the pollution does not in itself mean that the defendant’s creation of a situation in which the third party could so act did not also cause the pollution for the purposes of section 85(1).” [emphasis added]

Footnotes

¹⁵⁹ [1999] AC 22

¹⁶⁰ [2008] 1 AC 269, per Lord Bingham at §15 and 16

¹⁶¹ [1999] AC 22 at page 31-32

Lord Hoffman concluded that the mischievous act opening the tap did not break the chain of causation if, on the evidence, it was one which could be expected or anticipated in the ordinary course of things. He said:¹⁶²

“(4)...If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

(5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.”

Directions

- The judge will need identify the legal requirements of causation. The jury must decide whether the defendant caused the result.
- It may, and usually will be, enough for the prosecution to establish that the defendant’s act was one of the operative causes of the result, in which case the jury should be directed that it must be a significant or substantial cause in the sense that it must be more than trivial, trifling or minimal.
- When the evidence is that the defendant set in train a sequence of events which led to the result, but the jury needs to consider whether a new event has intervened so as to break the chain of causation, they will need help on the issue of foreseeability. The jury should be directed to consider whether the new event is one which could sensibly have been anticipated by a reasonable person, in the circumstances known to the defendant at the time, as a possible consequence of the defendant’s act. If it could not, then they should conclude that the chain of causation was broken and the defendant’s act should not be treated as an operative cause. If the result could sensibly have been anticipated the jury must be sure that the defendant’s act was a substantial and not a trivial cause of the result.
- Where the jury need to consider the response of the victim himself to the unlawful and threatening act of the defendant, they should be directed that they must be sure that (1) the response was a reaction to the defendant’s unlawful act and not the victim’s free choice and (2) was a response which could sensibly have been anticipated by a reasonable person in the circumstances known to the defendant at the time. Where the charge is manslaughter arising from the victim’s flight response the jury must also be sure that a reasonable person would have realised that the defendant’s unlawful act exposed the victim to a risk of some, although not serious, relevant harm (i.e. in consequence of the response).

Sources

Archbold 17-66, 18-8, 19-10,12, 19-100, 32-12; *Blackstone* A1.21/32; *Smith & Hogan* 12 ed. page 74-93

Footnotes

¹⁶² At page 35-36

(10) Agreement on the Factual Basis for the Verdict

Introduction

There are circumstances in which the judge may need to direct the jury to the effect that before they return a verdict of guilty they must be unanimous (or, following a majority verdict direction, agreed by the requisite majority) as to the basis upon which the verdict is returned.

(1) *Particulars of things said or done*

In *Brown*¹⁶³ the appellant was charged with offences of fraudulently inducing investments contrary to section 13(1)(a) of the Prevention of Fraud (Investments) Act 1958, the particulars being that he had fraudulently induced a person to enter into agreements to acquire shares in a company, by making misleading statements. The prosecution was required to prove at least one misleading statement. The appeal was allowed because the trial judge failed to direct the jury that they should be unanimous as to at least one misleading statement. The danger was that six jurors may be sure as to one statement and six sure as to another. If that was so, the prosecution would have failed to prove one of the essential elements of the offence, since the jury had to be unanimous as to the factual basis for it. Eveleigh LJ, giving the judgment of the court said:¹⁶⁴

“In a case such as that with which we are now dealing, the following principles apply: 1. Each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). 2. However, where a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but (because of the first principle above) any such matter must be proved to the satisfaction of the whole jury. The jury should be directed accordingly.....”

In *Mitchell*¹⁶⁵ the defendant was charged with unlawful harassment of an occupier contrary to section 1(3)(a) Protection from Eviction Act 1977. The particulars of the offence itemised several separate and isolated acts of harassment. The defence was that either the harassment had not occurred or the act alleged was justified in the circumstances. The Court of Appeal held that the jury should have been directed of the need for unanimity in respect of each alleged act of harassment. The principles to be extracted from the cases were:

- (i) where a number of different allegations were made in a single count, the judge should consider whether he should give the jury a direction that they must all be agreed on the particular ingredient which they rely on to find the defendant guilty of the offence charged;
- (ii) such a direction will be necessary only in comparatively rare cases. In the great majority of cases, particularly cases alleging dishonesty and cases where the allegations stand or fall together, such a direction will not be necessary. It is of the first importance that directions to the jury should not be overburdened with unnecessary warnings and directions which serve only to confuse them;
- (iii) however, in an appropriate case where there was a realistic danger that the jury might not appreciate that they must all be agreed on the particular ingredient on which they rely to find their

Footnotes

¹⁶³ [1984] 79 Cr App R 115 (CA)

¹⁶⁴ At page 119

¹⁶⁵ [1994] Crim LR 66

verdict of guilty on the count, and might return a verdict of guilty as charged on the basis that some of them found one allegation proved and others found another allegation proved, so that they were not unanimous as to the allegation which proved the offence, a direction should be given that they must be unanimous as to the proof of that ingredient.

In the *Mitchell* situation there may be several allegations of harassment any two of which would suffice. It is suggested that provided the jury understands that, if they are unanimous upon a sufficient number of particulars which, they are also unanimous in finding constitute the essential ingredient of harassment, they need not be concerned to reach a decision about others upon which they cannot agree.

(2) Particulars of things stolen

It will not be necessary for the prosecution to prove the theft of each article alleged to have been stolen (*Machent v Quinn*¹⁶⁶) provided the jury is unanimous as to at least one.

(3) Alternative evidential bases

When the offence charged (such as affray or riot) is founded upon a continuous series of events, no *Brown* direction is required, but where the events are separated in time and place so as to allow for conviction on the basis of either or both, the warning should be given. In *Smith (Christopher Anthony)*¹⁶⁷ the defendant was charged with affray. A violent incident took place at a party and spilled out into the street. The prosecution relied on the defendant's participation in events in the street. During the course of the evidence it emerged that the defendant had been involved inside, and the judge left to the jury the possibility of convicting on that basis. The Court of Appeal held that this was an error. Lord Bingham CJ said:¹⁶⁸

"It is essential in considering this submission to bear in mind the nature of the offence of affray. It typically involves a group of people who may well be shouting, struggling, threatening, waving weapons, throwing objects, exchanging and threatening blows and so on. Again, typically it involves a continuous course of conduct, the criminal character of which depends on the general nature and effect of the conduct as a whole and not on particular incidents and events which may take place in the course of it. Where reliance is placed on such a continuous course of conduct it is not necessary for the Crown to identify and prove particular incidents. To require such proof would deprive section 3(1) of the 1986 Act of its intended effect, and deprive law-abiding citizens of the protection which this provision intends that they should enjoy. It would be asking the impossible to require a jury of 12 men and women to be satisfied beyond reasonable doubt that each or any incident in an indiscriminate mêlée such as constitutes the typical affray was proved to the requisite standard.

Different considerations may, however, arise where the conduct which is alleged to constitute an affray is not continuous but falls into separate sequences. The character of the conduct relied on in each sequence may in such a case be quite different and so may the effect on persons who are (or might hypothetically be) present at the scene. The possibility then arises that half the jury may be persuaded that the first sequence amounted to an affray and the second did not, and the other half of the jury may be persuaded that the second sequence amounted to an affray and the first did not. The result would then be that there was no unanimous jury verdict in support of conviction based on either sequence."

Footnotes

¹⁶⁶ [1970] 2 All ER 255 (DC)

¹⁶⁷ [1997] 1 Cr App R 14

¹⁶⁸ At page 17

In *Keeton*¹⁶⁹ the charge was violent disorder and the incident had spilled outside from a nightclub. The Court of Appeal held that the danger did not arise because the judge directed the jury that they were concerned only with events outside the club. Hobhouse LJ explained the critical difference between arriving at a conclusion as to an essential element of an offence by different evidential routes and arriving at a verdict on separate factual bases:

“The necessity for each member of the jury to be satisfied of every essential ingredient in the offence is to be contrasted with the fact that not every member of the jury is required to take the same view of the evidence in the case. As was pointed out by Lawton L.J. in *Agbim* [1979] Crim.L.R. 171 (see also 86 Cr.App.R. at 245), each juror need not take the same evidential route in arriving at his conclusion. Some may be particularly impressed by the evidence of one witness, others by that of a different witness or by another piece of evidence. Provided that the evidence has caused each of them to be satisfied that the relevant ingredient has been proved, and to do so on the same factual basis, the requirement of unanimity is satisfied.”

In *Carr*¹⁷⁰ the defendant was charged with manslaughter. While refusing to give particulars of the act relied on the prosecution gave every appearance of relying upon a karate kick delivered by the defendant. The defendant denied the kick but, it was his case, he had thrown a punch in self defence. On the understanding that the prosecution relied on the kick the defence did not seek to explore with witnesses the exact circumstances of the punch. The judge left to the jury the possibility of convicting on the basis of the punch without explaining self defence as it related to the punch. Lord Bingham CJ said:¹⁷¹

“...we consider that the judge should on the facts of this case have directed the jury that they must reach a unanimous decision on the deliberate act (if any) which they found proved and on the unlawfulness of that act. Despite the argument of Mr Spencer, we cannot conclude that such a direction was given either implicitly, as he contends, or explicitly. There was in our judgment a real risk that some jurors might have found the defendant to have kicked the deceased and others found him to have delivered a punch, feeling themselves entitled to convict because the judge had told them that the defendant could be convicted on either basis. Had that happened there would have been six jurors not satisfied that the defendant had delivered the fatal kick and six jurors not satisfied that the deceased had been felled by a punch by the appellant. The absence of such a direction on the facts of this case was in our judgment a fatal flaw and we consider that that real risk existed.

We wish to make it plain that we are not seeking to lay down any general rule. There will often be minor differences between the facts alleged and the evidence given by various witnesses, and there is no need for agreement between all jurors on fine factual differences. Here, however, the difference between the two forms of assault did not depend on fine factual differences, but on a stark difference in the evidence of witnesses describing the two events, those two forms of assault giving rise to very different defences. We regard this case, taken on its own facts, as one which falls within the principles laid down in *Brown and Mitchell*.”

For application of the same principles to sexual offences see *Turner*¹⁷² and *D*¹⁷³.

Footnotes

¹⁶⁹ [1995] 2 Cr App R 241

¹⁷⁰ [2000] 2 Cr App R 149

¹⁷¹ At page 158

¹⁷² [2000] Crim LR 325

¹⁷³ [2001] 1 Cr App R 13

(4) *Separate causes of death*

On the trial of an individual for murder or manslaughter the prosecution may be able to prove that the defendant, by his unlawful act, killed the deceased but may not be able to prove which of his unlawful acts caused the death. In such circumstances the judge is not required to direct the jury that they need to be unanimous as to the cause of death, only that the defendant, by one or other or a combination of his unlawful acts killed the deceased.¹⁷⁴ In a case of murder the judge will need to direct the jury that they must be sure that an intent to kill or to cause really serious harm accompanied the act which caused death. Where one or more of the defendant's acts could have caused death and the defendant claims to have a defence or different defences concerning those acts (e.g. self defence, no intent) careful directions will be required.

In *Boreman*¹⁷⁵ three defendants were charged with murder. It was alleged that all three attacked the deceased and that, some time later, two or more of them set fire to his flat. The expert pathologists were agreed that the effects of fire made a significant contribution to death but there was disagreement as to whether the physical attack contributed to death. The Court of Appeal held that the judge should, in respect of each defendant, have explained the routes to verdict, in respect of each of which they needed to be unanimous and sure. On the facts, however, the verdicts were safe. Otton LJ said:

"The judge left the case to the jury on two possible bases, death by injuries and death by fire and did not give a Brown direction. Mr Clarke's argument that there was no danger of the jury being divided as to the causation of death is not in our view anything to the point. The need for a Brown direction arose, if it arose, not in respect of issues of causation but in respect of the ways or routes by which the offence could have been committed. Although the judge appears to have formed the view that the evidence in relation to the deliberate setting of the fire was somewhat tenuous, he did not withdraw the issue of murder by fire from the jury. He asked them to consider whether they were sure the fire was deliberately started and, if so, whether it was started by three defendants or two defendants acting together. As it was agreed that the fire was an operating cause of death, this left the jury with two routes by which the murder could have been committed: the infliction of injuries (if they were sure that these were an operating cause of death) and the deliberate setting of the fire, which was admittedly an operating cause of death. The judge did not direct the jury that before they could convict any defendant they must all agree on which basis he was guilty. In the light of the authorities as we have set them out, we think he probably should have done and should have given a direction tailored to the facts of the case. That might have included the direction that provided the jury were agreed on one basis or route for each defendant, it would not matter that some jurors also thought that that defendant had been involved in the other route as well."

Footnotes

¹⁷⁴ *Attorney General's Reference No 4 of 1980* [1981] 1 WLR 705

¹⁷⁵ [2000] 2 Cr App R 17

(5) *Principal and accessory*

In *Giannetto*¹⁷⁶ the Court of Appeal considered the effect of section 8 Accessories and Abettors Act 1861. The defendant was alleged either personally to have killed his wife or to have encouraged another to do so; the prosecution could not prove which. The defence argument was that the jury must be unanimous as to the basis on which the defendant was guilty. The court accepted that the jury must be unanimous as to each essential ingredient of the offence. However, in order prove murder it was not necessary to prove that the defendant was, personally, the killer. Kennedy LJ said:¹⁷⁷

“In the context of the present case it seems to us that the starting point must be section 8 of the Accessories and Abettors Act 1861 , as amended, which reads:

“Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.”

The effect of that section is that even if the appellant did no more than encourage someone else to kill his wife he was liable to be tried, indicted and punished as a principal offender, and where, as here, the prosecution, for good reason, is unable to say whether the defendant did more than encourage, it must be open to the prosecution to invite the jury as a whole to find that at least the defendant encouraged. If the jury does convict it may do so with some jurors satisfied that the defendant was actually the killer, but all will be satisfied that if not himself the killer at least he encouraged and by reason of the statutory provision in the 1861 Act which we have cited no more is necessary to prove the offence. If that approach is correct, then this ground of appeal must fail, so we turn now to consider whether, in the light of the more significant authorities cited before us, the approach which we have outlined can be sustained. We propose to refer to the authorities in chronological order.”

The court followed the reasoning in the persuasive authority of *Thatcher v R*¹⁷⁸, a decision of the Supreme Court of Canada considering provisions of Canada’s statutory Code similar to those contained within section 8 of the 1861 Act. Kennedy LJ drew upon the judgment of Dickson CJ as follows:

“At p. 306 Dickson C.J.C. pointed out that section 21 of the Code “has been designed to alleviate the necessity for the Crown choosing between two different forms of participation in a criminal offence. The law stipulates that both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability.” He went on to point out that if the different forms of participation had been set out in different counts the defendant might well have been acquitted on each count “notwithstanding that each and every juror was certain beyond a reasonable doubt either that Thatcher personally killed his ex-wife or that he aided and abetted someone else who killed his ex-wife”. That, said the Chief Justice, was precisely what section 21 of the Code was designed to prevent, and he continued: “If there is evidence before a jury that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other, it is ‘ a matter of indifference’ which alternative actually occurred: ... section 21 precludes a requirement of jury unanimity as to the particular nature of the accused’s participation in the offence. Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference?”

Footnotes

¹⁷⁶ [1997] 1 Cr App R 1

¹⁷⁷ At page 4

¹⁷⁸ [1987] 39 DLR (4th) 275

If, of course, one of the possibilities revealed by the evidence exculpates the defendant, he must be found not guilty, since it is only if all innocent possibilities are excluded that a verdict of guilty can be justified. Commenting upon the view of Professor John Smith in his commentary in the *Criminal Law Review*, Kennedy LJ said:

“In an article in the 1988 *Criminal Law Review* Professor Smith considered the English authorities, and concluded that the principle stated in *Brown* applies “ when the prosecution allege more than one factual basis for the crime charged and it is not possible to say ‘ if it was not the one then it must have been the other’ ” [1988] *Crim.L.R.* 344 . If in any given case the factual basis of the crime charged is in reality coterminous with an essential element or ingredient of the offence then we can accept without difficulty Professor Smith’s formulation, and in relation to the facts of the present case it was possible to say, plainly and the prosecution did say, that if the appellant was not himself the killer, then he instigated the offence.”

(6) *Enquiry as to basis for verdict*

It follows that if the judge intends to ask the jury whether they have convicted on one basis rather than another they must be told that they need to be unanimous as to that basis. Unless the jury has been so directed it is not practically possible to ask the question.

The Court of Appeal has considered on several occasions the impact on sentencing of a verdict of manslaughter as an alternative to murder where the jury could have returned the verdict on more than one basis. In *Matheson*¹⁷⁹ Lord Goddard CJ said, *obiter*, that where the jury returned such a verdict they should be asked for the basis on which they returned it, for example diminished responsibility or provocation, or both. If the jury has followed a Route to Verdict provided by the trial judge they may never have reached diminished responsibility because they had already resolved to return a verdict of manslaughter on the grounds of provocation, the burden being upon the prosecution to disprove provocation. Equally, they may not have reached provocation because they were not sure that the prosecution had proved the intent required for murder.

In *Jones (Douglas Leary)*¹⁸⁰ the Court of Appeal held that the judge was not obliged to give a direction that the jury must be unanimous as to the basis upon which they found the defendant not guilty of murder but guilty of manslaughter, since the essential ingredient of manslaughter was an unlawful act giving rise to a risk of harm which actually caused death. It is respectfully suggested that:

- (1) If half the jury is not sure that the defendant had the intent required for murder and the other half is sure he did but thought he may have been provoked, or
- (2) If half the jury concludes that the defendant may have been provoked and the other half is sure he was not but conclude it is likely his responsibility was diminished,

the prosecution should be entitled to a re-trial of the offence of murder. If the jury receives a written route to verdict which sets out each logical step ((1) intent, (2) provocation, (3) diminished responsibility) and are told that they should be unanimous (or in a lawful majority) in their answer to each question before proceeding to

Footnotes

¹⁷⁹ [1958] 1 WLR 474

¹⁸⁰ *The Times* 17 February 1999

the next, the practical result will be that either the jury cannot reach a verdict or they will be agreed upon the basis for a verdict of guilty of manslaughter.

The judge has the discretion whether to make the enquiry.¹⁸¹ If he does not the judge may form his own view upon the evidence and, if he does, he should explain his reasons for the view he has reached.¹⁸²

Footnotes

¹⁸¹ *Cawthorne* [1996] 2 Cr App R (S) 445

¹⁸² *Byrne* [2003] 1 Cr App R (S) 68, [2002] EWCA Crim 1975

CHAPTER 6: WITNESSES

(1) Special Measures

Introduction

Section 32 Youth Justice and Criminal Evidence Act 1999 (as amended by Criminal Justice Act 2003, section 331 and schedule 36, paragraphs 74 and 75) provides:

“Where on a trial on indictment with a jury evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.”

Special measures directions may permit evidence to be given¹⁸³:

- (i) Behind screens¹⁸⁴;
- (ii) By means of live link¹⁸⁵;
- (iii) In private¹⁸⁶;
- (iv) In chief by video recording¹⁸⁷;
- (v) With the aid of an intermediary¹⁸⁸;
- (vi) With the aid of a device to communicate questions or answers¹⁸⁹.

In *Brown and Grant*¹⁹⁰ the Court of Appeal held that the statutory obligation was to give the warning. If the warning was given when the witness gave evidence it was not essential to repeat it in the summing up.

Directions

- The risk to be avoided is prejudice to the defendant. The only adverse inference likely to occur to the jury is the possibility that it has been necessary to protect the witness from the defendant or his associates.
- Judges usually inform the jury that the use of screens/live link/video recorded evidence in chief has become commonplace.¹⁹¹ The purpose of screens and live link is to permit the witness the comfort of giving evidence away from the public gaze.

Footnotes

¹⁸³ For the conditions see sections 16-22 YJCEA 1999 and Rule 29 Criminal Procedure Rules

¹⁸⁴ Section 23 YJCEA 1999

¹⁸⁵ Section 24 YJCEA 1999

¹⁸⁶ Section 25 YJCEA 1999

¹⁸⁷ Section 27 YJCEA 1999

¹⁸⁸ Section 29 YJCEA 1999

¹⁸⁹ Section 31 YJCEA 1999. Note section 28 (cross examination and re-examination on video) not yet in force.

¹⁹⁰ [2004] EWCA Crim 1620; [2004] Crim LR 1034

¹⁹¹ The use of special measures is not confined to any particular category of case. They can be used in any case in which the statutory criteria are met.

- The jury should not think that this reflects in any way on the defendant or his case.¹⁹²
- The jury may be informed that an ABE interview is to stand as the witness' evidence in chief. For that reason it is important to pay the same close attention as if the witness had been present in court to give the evidence. It is not like a photograph or a CCTV film of the incident which can be consulted again later.

Footnotes

¹⁹² *Brown and Grant* at §§18 and 19

(2) Anonymous Witnesses

Introduction

1. In *Davis*¹⁹³ the House of Lords declared that there was no discretion at common law to permit witnesses to give evidence anonymously. On 22 July 2008 the Criminal Evidence (Witness Anonymity) Act 2008 received Royal Assent. As from 1 January 2010 sections 2-5 of the 2008 Act are replaced, in almost identical terms, by sections 86-90 Coroners and Justice Act 2009.
2. The 2008 Act abolished any existing common law rules relating to the withholding of a witness' identity from the defendant but otherwise left untouched the rules relating to public interest immunity.¹⁹⁴ The 2008 and the 2009 Acts created a statutory scheme for the exceptional admission of evidence by an anonymous witness. The application may be made by the prosecution or the defence. The Attorney General has issued guidelines to prosecutors as to the principles to be considered before an application is made.¹⁹⁵ Pending specific rules to be made by the Criminal Procedure Rules Committee¹⁹⁶, Practice Direction I.15 has been added to the Consolidated Criminal Practice Direction as amendment no. 21.¹⁹⁷
3. The applicant¹⁹⁸ must satisfy Conditions A-C¹⁹⁹ and in deciding whether those conditions are satisfied the court must have regard to the matters listed in section 5.
4. The provisions of the Act were reviewed by a five judge constitution of the Court of Appeal in *Mayers and Others*²⁰⁰. An anonymity order is to be regarded as a special measure of "last practicable resort".²⁰¹ Save in the exceptional circumstances provided by the Act the ancient principle that a defendant is entitled to know the identity of his accuser is maintained.²⁰² The rationale of the statutory scheme was described as follows:

"The Act must be taken to reflect Parliament's view of how best to address the countervailing interests which arise in every criminal trial, those of the defendant, the witnesses and victims, as well as the public interest in a fair trial process which protects the interests of both, and so far as possible, secures the conviction of those who are guilty and the acquittal of those who are not. It provides a comprehensive statutory structure to deal with the many potentially conflicting problems to which witness anonymity may give rise. It does so in the context of numerous other provisions which address the fairness of the trial process as well as the protection of witnesses and the preservation of their rights, whether they are to be found in statute, the common law or in the jurisprudence of the European Court."²⁰³
5. There is no power at common law or under the 2008 (or the 2009) Act to permit the statement of an anonymous witness to be read (e.g. under section 116 or section 114 Criminal Justice Act 2003).²⁰⁴

Footnotes

¹⁹³ [2008] 3 WLR 125; [2008] UKHL 36

¹⁹⁴ Section 1 Criminal Evidence (Witness Anonymity) Act 2008

¹⁹⁵ Issued 21 July 2008, Archbold Appendix A-273

¹⁹⁶ Section 3(8) CE(WA)A 2008; section 87(8) CandJA 2009

¹⁹⁷ Archbold Supplement 8-68s; Blackstone D14.121 and Appendix 5

¹⁹⁸ Prosecutor or defendant, section 3 CE(WA)A 2008 and, now, section 87 CandJA 2009.

¹⁹⁹ Section 4 CE(WA)A 2008; section 88 CandJA 2009. Note the change to Condition C in section 88(5).

²⁰⁰ [2009] 1 Cr App R 30, [2008] EWCA Crim 1418

²⁰¹ §8

²⁰² §5

²⁰³ §7

²⁰⁴ §113

Directions

Section 90 of the Coroners and Justice Act 2009 provides:

“(1) Subsection (2) applies where, on a trial on indictment with a jury, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.

(2) The judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant.”

In *Mayer and Others*²⁰⁵ the Court of Appeal gave assistance as to the scope of section 7 of the 2008 Act which was in identical terms:

“**Section 7** deals expressly with a judicial warning to the jury, “appropriate” to ensure that the defendant is not prejudiced by the “fact” of the order. In general terms, the warning must be sufficient to ensure that the jury does not make any assumptions adverse to the defendant, or favourable to the witness, from the fact that an anonymity order has been made, and in particular must not draw an implication or inference of guilt against the defendant. **Section 7** is sufficient, and if it were not, we should in any event expect judges addressing the problem, further to direct the jury about the obvious difficulties facing a defendant who is challenging either the credibility or the accuracy of an anonymous witness. We should add that when considering an appeal against conviction on the broad ground that witnesses anonymity orders should not have been made, and that the subsequent conviction is unsafe, this court should stand back and make its own objective assessment whether the trial was fair, even if, at the time when the judge made the order, it was reasonable and appropriate. On this point the approach suggested by this court in *Davis (Iain)* was not reversed or criticised in the House of Lords.”

It follows that directions to the jury should include:

- A warning that anonymity is not to be taken as any reflection upon the defendant or his case
- An explanation how, if at all, the anonymity of the witness has put the defendant at a disadvantage in the conduct of his case

The warning, although phrased in the context of the facts of the case, will be common to all directions. The explanation will, however, depend upon the particular exigencies of the trial faced by the defence. On appeal against conviction following a witness anonymity order, the Court of Appeal will make an objective examination of the fairness of the trial. That will involve a consideration of the trial judge’s application of the statutory criteria, the practical steps taken by the trial judge to minimise any disadvantage to the defendant (e.g. the handling of disclosure issues) and the care with which specific difficulties for the defence and the risks inherent in them were explained in the summing up.

In *Nazir*²⁰⁶ the Court of Appeal considered the admission of the evidence (under the pre-*Davis* common law) of an anonymous witness who gave evidence that she had seen the victim of an ‘honour’ killing attempt to escape from the house where she was killed. It was held that the evidence would have been properly admitted

Footnotes

²⁰⁵ §14

²⁰⁶ [2009] EWCA Crim 213

under the 2008 Act, that there was no unfairness and that the conviction was safe. The trial judge's directions to the jury on the subject of anonymity were specifically approved.²⁰⁷

In the Illustration below an attempt is made to address a situation in which the jury is almost bound to infer that the witness' anonymity was necessary to protect the witnesses from the defendants or their associates. The trial judge will need to decide whether it is necessary to confront that reality and deal with it, or whether a simple instruction not to speculate and not to regard anonymity as relevant to the defendant's cases is sufficient to prevent prejudice to the defendants.

Illustration – witness anonymity orders – acknowledgement that witnesses may be in fear of disclosing their identity – fear not to be attributed to the defendants – disadvantages of anonymity – need to exercise caution – particular danger of undisclosed interest to serve – existence of supporting evidence – value of anonymous evidence for the jury to decide

Those who witness events of terrifying violence, particularly violence in the context of what looks like gang warfare, are sometimes afraid to give evidence. Their fear of reprisals does not arise from any threat made by or on behalf of any defendant. None is suggested here. It is the imagination of the possible consequences of giving evidence under the public gaze which generates their fear. It is a central principle of our system of criminal justice that a person accused of crime is entitled to know the identity of witnesses whose evidence incriminates or is capable of incriminating him. In rare circumstances the court is permitted to receive evidence from witnesses whose identity is unknown because, in the absence of such a measure, the evidence would not be available at all. That is what has happened in the present case.

Because this situation is so unusual, and because it imposes undesirable limitations on your consideration of the evidence, it is necessary for me to be specific in my directions to you. It would be wrong to make any assumptions about the underlying reasons for anonymity. The fact that a witness is anonymous supports neither the witness' believability nor, in any other way, the prosecution case against any defendant. You must not allow the fact that evidence has been given by witnesses who are anonymous to prejudice your minds towards the defendants or their cases. You should concentrate upon the evidence that witnesses have given and not speculate upon what may have been the reason for their anonymity. The fact that evidence has been given anonymously is, however, relevant to your consideration of its reliability. If a defendant knows the identity of a witness he is in a position to make enquiries about that witness' background and reputation. By this means the defendant would be able to test the evidence of the witness and you would be in a better position to make the judgement whether the evidence is reliable or not.

In this case the prosecution has provided to the defence a good deal of information about each of the witnesses, and you have heard that some of that material has been put to the witnesses and accepted. To that extent the disadvantage to the defendants of not knowing the identity of their accusers has been reduced. However, the defendants remain disadvantaged because the information supplied is itself anonymised (i.e. it is edited to remove any references which may identify the witness). Nothing capable of leading to the discovery of the witness' identity has been disclosed. It follows that there may be material of which you have not heard which could have affected your judgment about the reliability of the evidence. You should therefore exercise caution when you are considering the evidence of each of these witnesses. In particular you should not make assumptions about their impartiality but you should examine the evidence of each witness on its merits.

Footnotes

²⁰⁷ See also the similar post -2008 Act examination of the trial judge's decision to admit anonymous evidence in *Powar and Powar* [2009] EWCA Crim 594

Three of the witnesses are anonymous. Each them identifies one or more of the defendants as members of the group which carried out the attack on the deceased. Two of the witnesses 'A' and 'B' were with the deceased when the attack took place. They both identified the first defendant as the knife man. It is submitted on behalf of the defendants that it is quite clear 'A' and 'B' were members of a street gang of which the deceased was a leading member. Despite the reluctance of 'A' and 'B' to reveal their membership of the gang, you may think it safer to conclude for the purpose of judging their evidence that they did indeed have a loyalty to the deceased which exceeded that of ordinary friendship. The danger which is highlighted on behalf of the defendants is that 'A' and 'B' may have been motivated to give the evidence they did by their enmity towards the first defendant and his group rather than by a desire to assist justice. This is a possibility which you must bear firmly in mind when you consider their evidence. Although you have been informed of the witness' previous convictions, the defence submits that their anonymity has prevented the kind of enquiries which might, through other sources, have revealed the full extent of their activities as members of the X Street gang, and of their attitude towards the defendants.

You will need to consider the circumstantial detail of the evidence given by 'A' and 'B' in order to assess whether you can be sure that an improper motive can be excluded. If you are left in doubt then you should not act upon their evidence. In making your assessment of their evidence you will also want to consider whether it is supported by evidence from sources independent of them. You will recall that both 'A' and 'B', when spoken to by the police on the day of the killing, named the defendants as responsible. They were not to know that some 6 weeks later scientific evidence would emerge which was capable of incriminating the defendants. The scientific evidence is not, as the prosecution acknowledges, conclusive. However, to the extent that it does tend to link the defendants with the killing, it is relevant to the question whether 'A' and 'B' have given truthful evidence. Whether it in fact assists in this respect is for you to judge.

Witness 'C', it is accepted on all sides, is independent in the sense that she has no association with the X Street gang, nor with any of the defendants. She lives several miles away from the disputed territory and happened to be in the area only because she had business to conduct at the industrial estate where the attack took place. She was parked in a car a short distance away from the attack when the attackers ran past her making good their escape. Witness 'C' also attended an identification procedure where she identified two of the three defendants. It is not suggested that 'C' is anyone other than an honest witness doing her best to make an accurate identification of those she saw. It is the defence case that she was mistaken. She is in a different position from witnesses 'A' and 'B' to the extent that it cannot reasonably be said that there is any further information about her which might affect your assessment of the truthfulness of her evidence. The defence has been able to ask all questions relevant to the accuracy of her identification evidence, including opportunity, conditions and the quality of her recollection. In due course I shall explain what should be your approach to identification evidence in general and to 'C's identification in particular. If, however, you conclude that witness 'C' gave reliable and accurate evidence it is capable of providing additional support to the evidence of witnesses 'A' and 'B'. The extent to which it assists you in that regard is a matter for you to consider and resolve.

Sources

Archbold 8-68a/68c, Supplement 8-68a/71, 12-77, Appendix A-273; Blackstone D14.120/122

(3) Intermediaries²⁰⁸

Introduction

1. When an intermediary is employed in the trial the jury must be given a direction under section 32 Youth Justice and Criminal Evidence Act 1999 (paragraph 15 below). The role of the intermediary will need to be explained to the jury at the outset.
2. Section 29(1)-(2) of the 1999 Act provides :
 - (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (an intermediary),
 - (2) The function of an intermediary is to communicate :-
 - a) to the witness, questions put to the witness, and
 - b) to any person asking such questions, the answers given by the witness in reply to them,
 and explain such questions or answers so far as necessary to enable them to be understood to the witness or person in question.
3. The section came into force in February 2004, with a number of pilot courts, and was generally available in courts in England and Wales, both Magistrates and Crown Courts, from 2006. Although the statute only allows for their use in respect of prosecution and defence witnesses, courts have, in the exercise of their inherent jurisdiction, ordered the use of an intermediary for a defendant outside the statutory scheme.
4. All intermediaries are speech and language specialists. Most are speech and language therapists, with many years of practical experience. Their role is independent, and their primary duty is to assist the court with two way communication. Intermediaries are not expert witnesses. They are never to express an opinion as to whether or not the witness is speaking the truth. Only an appropriate intermediary for a particular case can be appointed by the court. Such a person can be :
 - (1) a registered intermediary registered by the Intermediaries Registration Board and chosen for skill in facilitating communication with vulnerable people and who have completed an approved assessed training course on the role of intermediaries in criminal proceedings,
 - (2) an unregistered intermediary, but who is someone who is a recognized professional in two way communication such as a speech therapist,
 - (3) in an appropriate and rare case, a carer or family member, who can overcome particular problems with a witness and a person who knows the witness well. In such a case, a registered intermediary should have positively evaluated the ability of the carer or family member to facilitate communication.

Footnotes

²⁰⁸ We are grateful to HH Judge Nicholas Browne QC, Course Director for the Serious Sexual Offences Seminars, for the content of this section. Note also the Equal Treatment Benchbook, Parts 4 (Children) and 5 (Disability).

5. Intermediaries are only available for certain categories of witnesses, defined by section 16 of the Youth Justice and Criminal Evidence Act 1999:-
- (1) witnesses under the age of 17 at the time of the hearing,
 - (2) any witness the quality of whose evidence is likely, the court considers, to be diminished by reason of:-
 - a) any mental disorder within the meaning of the Mental Health Act 1983, or
 - b) a significant impairment of intelligence and social functioning, or
 - c) a physical disability or a physical disorder.

In assessing whether the witness falls into category 2(c) the court must consider any views expressed by the witness. Quality of evidence refers to its completeness, coherence (ability to answer questions intelligibly) and accuracy.

Procedure

6. In the case of prosecution witnesses, the investigating police officer should identify any communication difficulties which the witness has. After an early special measures meeting with the Crown Prosecuting Service, the officer must contact the OCJR, which manages the national register, and provides funding. The officer then makes a referral. The intermediary then meets and assesses the witness. Consent of the witness or the parent or guardian is necessary.
7. The officer provides the intermediary with an outline of the alleged offence. The intermediary meets the witness, makes a written assessment and writes a report for the court. The intermediary does not discuss the nature of the case with the witness, and a third party must be present at the assessment. This should be the interviewing officer. As a result of the assessment, the intermediary reaches a conclusion on the following matters:-
- (1) whether the witness can give evidence at all,
 - (2) whether the witness can give evidence with the assistance of an intermediary,
 - (3) whether the witness needs the assistance of an intermediary to give his/her best evidence,
 - (4) whether the intermediary possesses the particular skills required to help this witness,
 - (5) whether the witness wishes the intermediary to assist him/her.
8. If the witness can give evidence assisted by the intermediary, the ABE interview is then conducted. The intermediary is not the interviewing officer. The intermediary's role is to assist two way communication. The intermediary is required to make a declaration under section 29(6) of the YJCEA 1999 as follows:
- "I solemnly sincerely and truly declare that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding."

The same declaration is used at trial.

9. Once the interview is concluded, the intermediary writes a report to the court setting out the witness's needs, and reaching their conclusions on how the witness can give their best evidence before the court.
10. In the case of a defendant, this is not an application for special measures. However, it should be made in writing and supported by the report of the intermediary. It is necessary to ascertain whether the intermediary is required throughout the trial or just for the giving of evidence by the defendant. The role of the intermediary must be explained to the jury.

Pre trial hearings and case management

11. Often, there is no intermediary at the ABE interview stage, but the need for an intermediary is identified by the prosecution advocate upon assessment of the evidence. Not infrequently, the Judge himself/herself sees the need for an intermediary.
12. An application for special measures must be made for provision of an intermediary at trial. If an intermediary is already instructed, the Judge must give retrospective approval. If not, the Judge must consider the application, supported by a written report by the intermediary. The procedure is set out at Rule 29 of the CPR, involving a written application, a specific timetable, and a directions hearing. Generally, this is done at the stage of the PCMH. However, such an application can be made late, even on the day of the trial itself. Often, the application for an intermediary is unopposed, but if it is opposed, the Judge must make a judgement under sections 16 and 29 the Act.

The intermediary at trial

13. Before the trial starts, it is essential for the Judge to conduct a short pre-trial hearing to set ground rules for examination of the witness with the intermediary present. The conclusions of the intermediary's report are discussed. Matters which should be aired include: problems of comprehension problems; at what intervals breaks should be taken; how and when the intermediary should intervene; what vocabulary should be used for body parts; the use of diagrams to save embarrassment; the wearing of wigs and gowns; the rephrasing of a question; whether it is necessary for the witness to watch the ABE interview in the presence of the jury; whether the interview may be watched on one day and cross examination take place on the next. The advocates are generally advised of the need to ask short and simple questions and warned that, in the event of intervention, they will be given just one opportunity to rephrase a question.

Explanation to the jury

14. The Judge must then explain to the jury the role of the intermediary at court. The following points must be stressed:-
 - (1) the intermediary is not an expert,
 - (2) the intermediary is independent,
 - (3) the intermediary is present to assist with two way communication in court,
 - (4) the intermediary will only intervene if a communication issue is identified.
 - (5) Any particular health problems of the witness should be identified and explained.

15. As with other special measures, the Judge is required (section 32) to inform the jury that the fact that there is an intermediary must not prejudice the defendant. The jury would not see the intermediary's written report. That is for the benefit of the Judge in deciding whether or not an intermediary is an appropriate special measure, and enables the Judge to stay in control of the proceedings.
16. Once the ABE interview has been played, the intermediary should make the declaration in court (see paragraph 8 above) and briefly explain his or her qualifications and training.
17. Once cross examination has commenced, the primary role of the intermediary is to ensure that the witness understands questions put, and to intervene if the question is too long, or complex or, for some other reason, the witness does not understand the question. If the advocate asks appropriate short simple questions, the intermediary will probably not have to intervene at all. The Judge's duty to control questioning is paramount; he/she should intervene if needed, even if the intermediary does not.
18. In Measuring Up, a report written by Plotnikoff and Woolfson, commissioned by the NSPCC, and published in July 2009, the authors carried out a study of the experiences which young witnesses had undergone at court. 182 child witnesses were interviewed between May 2007 and October 2008. In the section of the report headed "Ensuring appropriate questioning at court", the authors state:-

"The findings of this study indicate a gap between the intent of this special measure legislation (i.e the intermediary special measure) and the ability or receptiveness of practitioners to recognize young witnesses' eligibility. They also highlight the need for Judges and magistrates to set ground rules for questioning, whether or not an intermediary is appointed; asking for information about the child's communication abilities and concentration span; inviting advocates to state what steps they are taking to ensure that questions are developmentally appropriate; and warning that if they fail to do so, the Judge or magistrates will intervene."

Sources

Archbold 8-55p, 64a; Blackstone D14.118/119; CPR 29

CHAPTER 7: IDENTIFICATION EVIDENCE

(1) Visual Identification

Introduction

The risk of honest but mistaken visual identification of suspects requires investigators to comply with Code D (Police and Criminal Evidence Act 1984),²⁰⁹ and judges to be discriminating in the admission of evidence, and explicit as to the risk of mistake in their directions to the jury.²¹⁰

The procedures required by Code D are “designed to test the witness’ ability to identify the person [he] saw on a previous occasion” and to “provide safeguards against mistaken identification”.²¹¹

The principal safeguards provided are:

- (1) Making a record of a description first given by the witness, before any identification procedure takes place.²¹²
- (2) Holding an identification procedure whenever the identification is disputed, unless it is not practicable or it would serve no useful purpose.²¹³

Breach of the procedures provided by Code D may form the basis of an application to exclude the identification evidence under section 78 Police and Criminal Evidence Act 1984.

Judges are required to examine the state of identification evidence at the close of the prosecution case and to stop the case if it is poor and unsupported.²¹⁴

Directions

A *Turnbull* direction is required where identification is a substantial issue. This includes “recognition” evidence. It will not be required where the sole issue is the truthfulness of the witness unless, assuming the witness to be honest, there is also room for mistake.²¹⁵

The requirements of a *Turnbull* direction are as follows:

- There is a special need for caution when the case against the accused depends upon the correctness of a visual identification
- The reason for caution is experience that a witness who is genuinely convinced of the correctness of his identification may be impressive but mistaken. This may be so even when a number of witnesses make the same identification

Footnotes

²⁰⁹ Archbold Supplement A-112; Blackstone Appendix 1, page 2751

²¹⁰ *Turnbull* [1977] QB 224

²¹¹ CodeD 1.2

²¹² CodeD 3.1 and 3.2(a)

²¹³ CodeD 3.12

²¹⁴ *Fergus(Ivan)* [1994] 98 Cr App R 313

²¹⁵ *Cape* [1996] 1 Cr App R 191; see also *Beckford* 97 Cr App R 409 (PC); *Capron* [2006] UKPC 34; *Giga* [2007] Crim LR 571

- The jury should examine the circumstances in which the identification came to be made. There are two elements to these circumstances both of which go to the reliability of the identification: (1) the opportunity to register and record the features of the suspect and (2) the reliable recall of those features when making the identification.
- (1) (i) How long was the suspect under observation?
(ii) At what distance?
(iii) In what light?
(iv) Was the observation impeded in any and, if so, what way?
(v) Had the witness seen the suspect before (i.e. was this recognition?) and, if so, how often and in what circumstances?
- (2) (i) What period elapsed between the observation and the identification?
(ii) Was there any material difference between the description given by the witness at the time and the suspect's actual appearance?
(iii) Any other circumstances emerging in the evidence which might have affected the reliability of the identification (e.g. press photographs, conversations with others)
- Any specific weaknesses in the identification should be identified (e.g. fleeting opportunity, bad light, speed of incident, photographs inadvertently viewed)
- Evidence capable (and, when necessary, not capable) of supporting the identification should be identified
- If the defence is alibi the jury should be directed that if the alibi is rejected it does not (or may not) follow that the defendant committed the offence because a false alibi may be constructed for reasons other than guilt (e.g. because an alibi is easier to present than the true defence)
- If the judge admits the evidence notwithstanding a breach of Code D, he should explain how the breach may affect the jury's consideration of the evidence. In *Forbes*²¹⁶ V recognised his assailant in the street. No identification parade was held. The Appellate Committee said:

"In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The Court of Appeal has so ruled on many occasions, and we approve those rulings: see, for example *R v. Quinn* [1995] 1 Cr App R 480 at 490F. The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required....., **the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has been an identification parade with the consent of the suspect, and the eye-witness has identified the suspect, in circumstances involving no breach of the code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also**

Footnotes

²¹⁶ [2001] 1 AC 473, [2000] UKHL 66

wish to alert the jury to the possible risk that the eye-witness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.” [emphasis added]

Illustration – evidence of visual identification (recognition) of an intruder at night – particulars of description taken down - witness recognises suspect in the street – no identification procedure held

Facts

The case against the defendant, that he burgled the offices of X Ltd, depends upon the correctness of the identification of the defendant made by Mr A, the caretaker and security guard. Let me remind you of his evidence. He was sitting in his security office at about 11 pm when he heard a crash. He left his office, went towards the noise and, as he rounded the corner to the rear of premises, he saw a broken window. Inside, on the ground floor, he saw a figure. He kept the figure under observation for about 5 minutes. During that time the person inside was moving about, apparently trying drawers to desks and filing cabinets. While Mr A was keeping observation he was making a mobile telephone call to the emergency services. Something appeared to disturb the intruder who made his way back out of the window. Mr A challenged him but the intruder ran off in the direction of the city centre. Shortly afterwards PC B arrived. Mr A told him that he thought he had seen the intruder before. He also bore a strong resemblance to one of the cleaners who worked at the offices three days a week between 7 pm and 10 pm. Mr A thought he had seen the intruder on occasions in the past congregating with others on benches around the cenotaph in the town centre. PC B wrote down the description which Mr A gave him. Mr A agreed to go with PC B in his police car to the town centre to see whether the intruder was still about. They arrived at the cenotaph at about 11.30 pm where they saw a group of young men. Mr A immediately pointed out a man, the defendant, sitting on a bench with others, drinking from a can of lager. PC B approached the defendant and arrested him. When cautioned the defendant said, “I don’t know nothing about a break in. I’ve been here all night.” It turns out that the defendant is the son of one of the cleaners who works at X Ltd three days a week. The defendant has now given evidence in support of his alibi and he has called two witnesses to confirm it.

Turnbull

When you are considering the identification evidence of Mr A, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past made mistakes, even a number of witnesses making the same identification. You cannot convict the defendant unless you are sure that Mr A’s identification was accurate and, in making that judgment, you need to look carefully at the circumstances in which it was made and at any other evidence in the case which may support it.

Let us consider the circumstances in which the identification took place and, first, the opportunity Mr A had to make a reliable mental note of the figure he was observing:

1. Mr A had the intruder under observation for a period of 5 minutes. However, for most of that time he was looking at a shape. The intruder was wearing a waist length top with a hood which he kept up. Only when the intruder was climbing out of the broken window, when Mr A went to confront him, did he have a clear view of his face. That view lasted for a few seconds only.

2. *Mr A was a short distance from the intruder at all times and very close to him for the last few seconds. He said that he was about 6 feet away from him when he came out of the window.*
3. *There were no lights switched on inside the rooms where the intruder was walking about. There were, however, lamp standards in the street close by, which gave some illumination into the ground floor. Mr A said that when the intruder climbed out of the window there was a street lamp directly behind him which gave him a good view of the intruder's face.*
4. *There was nothing to impede Mr A's view as the intruder climbed out.*
5. *Mr A told you that he thought he recognised the defendant, as soon as he saw him, as someone he had seen on several occasions, hanging about in the town centre with his mates. The reason why he had reason to remember the defendant was because he bore a close resemblance to his father whom Mr A knew from work. It is more difficult, perhaps, for a witness to take in the features of a complete stranger, than it is for him to recognise the features of a person he knows already. However, you need to bear in mind that even people well known to one another make mistakes in recognition, something which you may have experienced yourselves.*

Let us now look at the circumstances in which Mr A came to make the identification in the street.

1. *Mr A was taken to the town centre by car within minutes after the intruder had left in that direction. This does not appear to be a case in which time may have impaired the witness' memory of the features he observed.*
2. *PC B read out the note he made of Mr A's description of the intruder. He was about 5'10"-6' tall. He was wearing a dark coloured waist length top with a hood. He was wearing blue jeans and a pair of trainers. Mr A could not see the intruder's hair which was covered by the hood but he did describe a small nose and prominent front teeth. He also saw a tattoo on the fingers of one hand but he could not recall which hand. The defendant was wearing clothes of this description when he was arrested half an hour later. The only discrepancy as to physical features put to Mr A was that the defendant is 5' 9" tall, not 5'10" or above. You should consider that difference between Mr A's description and the defendant's height and decide whether it is a mistake or miscalculation which affects the reliability of Mr A's evidence.*

It is clear that Mr A could not have made the identification he did solely from his observation of the intruder moving about inside the premises. His identification depends upon those few seconds when he had the intruder in close view as he climbed out of the window. To that extent, Mr A had a limited opportunity to take in what he was seeing. On the other hand, he had a sufficient view to give a description almost immediately afterwards.

It was suggested to Mr A on the defendant's behalf that he had correctly identified a man he had seen before in the town centre but he was mistaken in thinking that the intruder in the office was the same man. Mr A was adamant that he had the right man. You should consider carefully whether there is any room for mistake.

Breach of Code D

In circumstances such as those faced by PC B, namely a witness who may be able to make an identification of a person not yet known, a Code of Practice exists to regulate the procedure to be followed by police officers. PC B acted properly under the Code when he took Mr A to the town centre in an attempt to find the unknown intruder.²¹⁷ The procedure was, from PC B's point of view, successful, in that Mr A made a positive identification. However, since the correctness of Mr A's identification in the street was disputed, the Code further required that a formal identification procedure should then have been carried out.²¹⁸ It was not carried out. Furthermore, following the defendant's release on police bail he offered, through his solicitor, to stand on an identification parade. The offer was not accepted. The formal identification procedure would have required Mr A to view a number of people, either in film or in person, including among them the defendant, for the purpose of testing the correctness of Mr A's identification in the street.²¹⁹ It exists as a safeguard for the interests of those in the defendant's position, and gives the opportunity to the witness to reflect. PC B told you he thought that a further procedure would have served no useful purpose because Mr A had already made his identification of the defendant in the street. If he went through another procedure Mr A would simply be recognising the man arrested in his presence. That is an explanation which you will wish to consider and no doubt you will see some sense in it. Nevertheless, one of the safeguards deliberately created to protect suspects from mistaken identification was omitted. We cannot now know whether Mr A would, at a formal identification procedure, have entertained second thoughts about the correctness of his identification in the street or would have been able to make any identification. It is said on the defendant's behalf that his offer to take part in a formal procedure would hardly have been made if he knew that the evidence against him would simply be confirmed. You should bear that in mind when judging the reliability of Mr A's evidence.

Supporting Evidence

When you are making that judgment, you should have regard to any other evidence which tends to support Mr A's identification. First, I want to remind you of evidence which you should not regard as support for Mr A. Counsel for the prosecution suggested to you that the burglar may well have had inside knowledge of the office premises; otherwise, why would a single burglar bother entering premises not ordinarily associated with the storage of items of value which are easily removable, such as money—it would not be easy for him to remove a computer, for example. The defendant's father worked in these premises. He is the sort of person who might have such inside knowledge. If you reflect on this submission, it provides no support independent of Mr A because it starts from a premise that Mr A's identification is correct. If you knew nothing about the defendant, you could not possibly conclude that the burglar must have had inside knowledge. This is speculation. Furthermore, you have heard no evidence from which you could properly infer that the defendant knew anything useful about the premises. Therefore, please put this argument to one side and ignore it.²²⁰

Footnotes

²¹⁷ Code C 3.2

²¹⁸ Code C 3.2(d) and 3.12

²¹⁹ *Forbes* [2001] 1 AC 473, [2000] UKHL 66 at §20

²²⁰ *Jamel* [1993] Crim LR 52

There is, however, other evidence which, depending on your view, provides support for the identification. When the defendant was taken into custody his trainers were removed from him and sent for forensic examination. In the treads of both shoes shards of glass were found which were of the same refractive index as the glass remaining in the broken window. You heard from the expert that the refractive index is relatively common but it is typically window glass and not, for example, similar to glass used in the manufacture of bottles which one might find littering the street. The burglary took place half an hour before the defendant was arrested. The defendant could think of no occasion in the recent past when he might have trodden on glass. This evidence is capable of adding support to Mr A's evidence, but it is a matter for you to assess it and decide whether it does or not, and, if so, what weight you attach to it.

Alibi

Finally, on the subject of supporting evidence, I want to say something about the defendant's evidence of alibi. Clearly, if you are sure that Mr A's evidence is reliable, it would follow that the defendant's alibi is false. You must, of course, consider the alibi evidence with care before you reach such a conclusion. However, you will recall that the defendant and his witnesses were asked questions about the circumstances in which the alibi came to be advanced, and the ability of the witnesses to give evidence that the defendant was with them during critical half an hour between 11pm and 11.30pm. There were several inconsistencies between the witnesses, of which I will remind you in a moment. One of them ended up conceding that he was not himself in the area of the cenotaph at that time and had no idea where the defendant was. Putting Mr A's evidence on one side for a moment, if you were to conclude from the unsatisfactory way in which the evidence was given that the alibi evidence has been concocted, that fact is also capable of providing support for Mr A's identification. But that would be a conclusion about which you should be cautious, because a false alibi may be put forward for reasons other than guilt. One example is a defendant who thinks it is simpler to put forward a false alibi than to explain what he was really doing; another is a defendant who has a genuine alibi but thinks he may not be believed unless he can find others to support him. Only if you can exclude such possibilities should you regard a false alibi as any support for the prosecution case.²²¹

Sources

Archbold 14-1/42; Blackstone F18.2/26

Footnotes

²²¹ *Drake* [1996] Crim LR 109

(2) Identification from CCTV and Other Visual Images

Introduction ²²²

The proliferation of CCTV cameras has increased the number of cases in which relevant events are recorded and, therefore, attempts made by the prosecution to prove identification of suspects from such images.

In *Attorney General's Reference (No 2 of 2002)*²²³ the prosecution case was that the defendant was recorded in a CCTV film of indifferent quality, taking part in a riot. The prosecution sought to adduce the evidence of two police officers. The first officer spent several hours viewing the footage and, for that reason, became aware of an individual, the defendant, he later saw by chance. He identified the man in the film as the defendant and the evidence was adduced without objection. The second officer knew the defendant. He viewed the same footage in controlled conditions and recognised the defendant. The trial judge invited submissions from the parties on the ground that the second officer had no particular expertise and was in no better position than the jury to make an identification. He declined to admit the evidence and, later, ruled in favour of a defence submission of 'no case'. The prosecution sought the opinion of the Court of Appeal in an application made under section 36 Criminal Justice Act 1972. The Court found that the trial judge had been in error. The Vice-President, Rose LJ, identified 'at least' four circumstances in which, subject to the discretion to exclude the evidence under section 78 Police and Criminal Evidence Act 1984, and, subject to appropriate directions in summing-up, the jury can be invited to consider evidence of identification from a photographic image of the scene of the crime:

1. When the photographic image is sufficiently clear the jury can compare it with the defendant sitting in the dock.²²⁴
2. When a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give identification evidence.²²⁵ This may be so notwithstanding the loss of the image.²²⁶
3. A witness, such as a police officer, who does not know the defendant, but has spent many hours viewing and analysing photographic images, may acquire a specialist knowledge of the material. He can give evidence of his comparison between the images of the scene of the crime and a reasonably contemporary photograph of the defendant provided that those images are available to the jury for the purpose of testing the witness' evidence.²²⁷
4. A witness, expert in facial mapping techniques, can express an opinion based on a comparison between scene of crime images and a reasonably contemporary photograph, provided both images are made available to the jury for the purpose of testing the expert's evidence.²²⁸

Footnotes

²²² The photographing of suspects and the retention of photographs is governed by the Police and Criminal Evidence Act 1984, sections 64A and 54A, as amended, and Code D, paragraphs 3.31/33 and 5.1/11

²²³ [2003] 1 Cr App R 321, [2002] EWCA Crim 2373

²²⁴ As in *Dodson and Williams* [1984] 1 WLR 971, [1984] 79 Cr App R 220.

²²⁵ *Fowden and White* [1982] Crim LR 588; *Kajala v. Noble* [1982] 75 Cr App R 149 (DC); *Grimer* [1982] Cr LR 674; *Caldwell* [1994] 99 Cr App R 73; *Blenkinsop* [1995] 1 Cr App R 7

²²⁶ *Taylor v Chief Constable of Cheshire* [1987] 84 Cr App R 191 (DC)

²²⁷ *Clare and Peach* [1995] 2 Cr App R 333.

²²⁸ *Stockwell* [1993] 97 Cr App R 260; *Clarke* [1995] 2 Cr App R 425; *Hookway* [1999] Crim LR 750

Directions

(1) *Comparison made by the Jury*

In *Dodson and Williams* Watkins LJ expressed the view of the Court of Appeal as follows:

“What are the perils which the jury should be told to beware of? We do not think the provision by us of a formula or series of guidelines upon which a direction by a judge upon this matter should always be based would be helpful. Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant’s appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of relevance in this context in a particular case, which the jury must receive guidance upon from the judge when he directs them as to how they should approach the task of resolving this crucial issue.

In the present case we do not doubt that the jury was made well aware of the need to exercise particular caution in this respect.”

- What is required is an adapted *Turnbull* direction, including its warning of the risk of mistaken identification by several witnesses.
- The jury is, for this purpose, the witness of the event. The suspect will be unknown to them.
- The quality of the opportunity for observation will depend upon the clarity and completeness of the image which they are examining.²²⁹ They will not suffer the disadvantage of a fleeting glimpse since they can study the scene of crime image at leisure, but the quality of the image will not be perfect, it will be two-dimensional, and it may provide only a limited view of the suspect.
- The defendant’s appearance may have changed since the suspect’s image was captured on CCTV in which case the jury must beware speculation. A photograph of the defendant contemporaneous with the CCTV image may do much to remove this disadvantage.
- While the exercise of comparison will, in large measure, involve the study of similarities, the need to consider the existence of irreconcilable differences will be just as important. The existence of one difference may exclude the defendant altogether.

The jury should be reminded of any specific arguments addressed to them on behalf of the defendant.

Footnotes

²²⁹ In *Faraz Ali* [2009] Crim LR 40, [2008] EWCA Crim 1522, the CACD doubted that the images relied upon were of sufficient quality to invite the jury to use ‘the evidence of their own eyes’ and repeated that if such an exercise is undertaken, the jury must be given an explicit warning about the dangers of mistaken identification. See §§36-41, per Hooper LJ.

Illustration – Comparison by the jury of photographic images of a suspect at the scene of crime with the defendant – modified Turnbull direction – quality of images – significance of similarities and any dissimilarity – supporting evidence

You have seen the CCTV films and in your bundle several photographic stills recorded by CCTV cameras located close to the scene of the crime. There are three individuals depicted in those photographs. It is agreed between the prosecution and the defence that the person we have labelled '3' on each of those stills is the complainant. The two others we have labelled '1' and '2' are, it is also agreed, the complainant's attackers. The person labelled '2' is unknown to the prosecution. The prosecution case is that the person labelled '1' is the defendant.

There is no identifying witness. The defendant was arrested 3 days after the incident. His photograph was taken at the police station. You have also been able to observe the defendant in court for the last 2 days. You are invited to make a comparison between all these images and the defendant in person, and to conclude that they are all of one and the same man.

This is an exercise in identification in which there is a special need for caution. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked to make a comparison between images and the physical features of someone who was until this trial is a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspect '1' appears. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, you have the advantage of stills from two different cameras and views of the suspect's face both frontal and in profile. The first question you need to consider is whether these images are of sufficient quality to make any comparison with the defendant. If you are not sure they are, then you should abandon the exercise altogether. If they are of sufficient quality then you have the further advantage of being able to make your comparison in your own time and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

Next, you have a contemporaneous photograph of the defendant, one frontal and one in profile on each side. The main advantage of a contemporaneous photograph of the defendant is that it records his body shape and the length of his hair, and demonstrates the shape of his moustache at or about the time the incident took place.

Finally, you have the defendant in person, now clean shaven and wearing his hair much shorter than it was at the time, but giving you a 3-D view of the contours of his head and face.

When asked questions by his own advocate the defendant accepted that the person in the CCTV film bears a striking resemblance to himself. He denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially, common to the suspect and the defendant which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line up of men of similar appearance. What you do have is the ability to search for any features of suspect '1' which you do not find in the defendant and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

In reaching your decision you do not have to look at the images in isolation of the other evidence. Found in the defendant's bedroom was a pair of trainers. They are of a relatively common design but the expert evidence is that they are identical in all discernible respects to the footwear worn by suspect '1' in the still photographs taken at the scene. When he was arrested the defendant was wearing a T-shirt with a distinctive logo written on the front. The same logo appears on the T-shirt worn by suspect '1'. If, having considered all the evidence, you are sure that the person numbered '1' in your still photographs is the defendant, you can move on to consider whether he committed the offence charged. If you not sure they are one and the same person, you must find the defendant not guilty.

Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.

(2) *Recognition by a witness*

- The requirements of a modified Turnbull direction will be similar to those required when the jury makes the judgment for themselves (see also (1) Comparison made by the Jury above).
- When the prosecution relies both upon the evidence of a witness who recognises the defendant and the jury's own ability to compare the photographic evidence with the defendant in person, the jury may be directed that the evidence and their own examination can be mutually supportive. If so, they should be reminded of the danger that several witnesses can make the same mistake.²³⁰

Illustration – recognition by witness of suspect in scene of crime images – suspect known to police witness – modified Turnbull warning – advantages and disadvantages – jury using their own judgment – supporting evidence

The police recovered CCTV film from the local authority recorded by two separate cameras. As you have seen, those films depict an attack by two men on the complainant. You have in your bundle several photographic stills copied from the film. There are three individuals depicted in those photographs. It is agreed between the prosecution and the defence that the person we have labelled '3' on each of those stills is the complainant. The two others we have labelled '1' and '2' are, it is also agreed, the complainant's attackers. The person labelled '2' is unknown to the prosecution. The prosecution case is that the person labelled '1' is the defendant.

The complainant was unable to provide a description of either of his attackers and there was no witness at the scene to assist you. However, following the recovery of the films the investigating officers invited the local community policeman, PC A, to view them in controlled conditions. He was asked whether he could identify anyone on the films. PC A told you that he immediately recognised the victim and the person we have labelled suspect '1'. He was unable to identify the person labelled suspect '2'. PC A's evidence is that suspect '1' is the defendant.²³¹ He knew where the defendant lived and, as a result, the defendant was arrested. The defendant accepts that he and PC A live on the same estate and that, from time to time, they have spoken together in a local public house. The defendant maintains that although they are well known to one another, PC A was, and is, mistaken in his identification of the defendant as suspect '1'.

The prosecution case depends in large measure upon the correctness of PC A's identification of the defendant. There is a special need for caution before convicting upon such evidence. The reason is that experience shows that genuine and convincing witnesses can make mistakes in identification, even several witnesses making the same identification. While this is not identification by PC A of someone unknown to him, but the recognition of someone he knows, caution is still required because of the known danger that witnesses can make honest mistakes in recognition even of friends or family members.

Footnotes

²³⁰ *Caldwell* [1994] 99 Cr App R 73; See also *Faraz Ali* [2009] Crim LR 40, [2008] EWCA Crim 1522 in which the CACD (1) doubted that the image from which a police officer purported to recognise the suspect was of sufficient quality to permit recognition (the face was partially obscured) (2) doubted that his recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition, §§34-35.

²³¹ In *Smith (Dean)* [2009] 1 Cr App R 36 (page 521), [2008] EWCA Crim 1342 and *Chaney* [2009] 1 Cr App R 35 (page 512), [2009] EWCA Crim 21 the CACD identified a need that the Code D procedural safeguards, appropriately adapted, should be followed when a witness is asked to attempt a recognition from a scene of crime image. Thus, there should be a contemporaneous record of the witness' reaction and its terms which would enable the jury to make a meaningful assessment of its reliability. Furthermore, an explicit warning of the dangers of recognition evidence should be given to the jury.

There is one advantage which PC A has which he would not have enjoyed had he just been present at the scene of the assault. He has been able, at leisure, to test his first impression by viewing the CCTV films over and over again. His disadvantage has been that he has been limited to a two-dimensional image recording the scene at night.

You need to consider, first, the nature of the images seen by PC A in order to judge their quality since, only if the images are of acceptable quality could you conclude that it is safe to rely upon his recognition. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, PC A had views from two different cameras and views of the suspect's face both frontal and in profile. The first question you need to consider is whether these images are of sufficient quality for PC A to make any reliable comparison with the defendant. If you are not sure they are, then you should place no reliance upon PC A's evidence. If they are of sufficient quality then you will need to consider whether PC A's knowledge of the defendant's physical appearance was recent enough to make a reliable identification.

In judging the reliability of PC A's evidence you are able to make your own comparison in your own time and in as much detail as you need. When asked questions by his own advocate the defendant accepted that the person in the CCTV film bears a striking resemblance to himself. He denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially, common to the suspect and the defendant which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that neither you nor PC A has the advantage of a line up of men of similar appearance. What you do have are contemporaneous photographs of the defendant, taken on his arrest, and the ability to search for any features of suspect '1' which you do not find in the defendant and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

You are entitled to treat PC A's evidence and your own observation, if you agree with him, as support for each other but, before doing that, please bear in mind the danger, to which I have already referred, that several people can make the same mistaken identification. Only if you are sure that PC A has correctly identified the defendant as suspect '1' could you then proceed to consider whether he committed the offence charged. If you are not sure, you must find the defendant not guilty.

Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.

(3) *Comparison by a witness with special knowledge of scene of crime images*

In *Clare and Peach*²³² police officers had recorded good quality (colour) film of football supporters making their way to a match. After the match there was a violent confrontation between two groups of supporters outside licensed premises, recorded (in black and white) by CCTV cameras. PC Fitzpatrick studied the pre-match recordings and the lesser quality CCTV film and formed an opinion as to which defendant had been engaged in which acts of violence. He was permitted by the trial judge to give evidence explaining to the jury how he had reached his conclusions. The Court of Appeal approved his decision.²³³ The evidence was admissible for two purposes, first, to enable the jury to make their own comparison between the colour and black and white photographs and, second, as direct evidence of identification. The trial judge gave and the Court of Appeal approved, unfortunately without quoting it, his modified *Turnbull* direction.

For an appropriately modified *Turnbull* direction see also (1) *Comparison made by the Jury* above.

Illustration – comparison by witness with special knowledge – result of witness’ research now available to the jury – modified *Turnbull* direction – advantages and disadvantages

Following this violent incident the police recovered from the local authority two CCTV films. It was discovered that most of the incident, but not quite all of it, was captured on these films. The technology unit prepared a composite film which you have seen. The quality is admittedly not the best and it is recorded in black and white. Secondly, officers recovered from licensed premises in the town centre further CCTV films. They were of good quality, recorded in colour. You have in your bundles still photographs taken from each film. Several individuals were shown in those licensed premises shortly before the violence erupted outside. DC A set about studying both sets of films. His purpose was twofold. First, he endeavoured to separate out the individual confrontations which are recorded on the two black and white films. Second, he sought to ascertain whether any of those individuals shown in the colour film took part in the violence which could be seen in the black and white film and, if so, to identify them. DC A told you that he had spent upwards of two hundred hours viewing these films and taking still copies.

DC A has explained how he identified D1 and D2 drinking in the X wine bar before moving quickly towards the exit moments before the violence began. He asked you to note both their features and their clothing. He then drew to your attention individuals depicted in the black and white films which DC A says are, respectively, D1 and D2. He has identified them taking part in two separate attacks on youths outside, then joining together to carry out a joint attack on a third.

Footnotes

²³² [1999] 2 Cr App R 333

²³³ Lord Taylor CJ at page 338 said: “P.C. Fitzpatrick had acquired the knowledge by lengthy and studious application to material which was itself admissible evidence. To afford the jury the time and facilities to conduct the same research would be utterly impracticable. Accordingly, it was in our judgment legitimate to allow the officer to assist the jury by pointing to what he asserted was happening in the crowded scenes on the film. He was open to cross-examination, and the jury, after proper direction and warnings, were free either to accept or reject his assertions.

As to the identification by P.C. Fitzpatrick of individual actors on the film, which was Mr Green’s principal ground of complaint, we agree with the New Zealand Court of Appeal [*Howe* [1982] 1 NZLR 618] that such identifications were “no more secondary evidence than any oral identification made from a photograph”. True, P.C. Fitzpatrick did not know either of the appellants before the day of the match. However, he and his colleague had taken high quality colour film and still photographs of West Bromwich fans including the appellants arriving at the Stadium, sitting in it and leaving it. There was no issue that the appellants were clearly shown on the colour film and photographs. By repeated study of those likenesses, P.C. Fitzpatrick was well qualified to say: “I know what A looks like, indeed what he looked like and wore on the day, and I can identify him on the black and white video film”.

D1 and D2 have made formal admissions that they are indeed to be seen in the colour film. We have marked them as '1' and '2' on our copies of the stills taken from the colour film. However, they deny that they are also to be seen taking part in the violence outside. Their case is that DC A is mistaken in attributing to them the actions of the suspects we have marked as '1' and '2' in the black and white stills. They say they are not to be seen in the black and white film because they are on the periphery watching, but taking no part in, the violence.

The prosecution case depends almost entirely upon the correctness of DC A's identification of D1 and D2 in the black and white film. DC A was not an identifying witness in the sense that he was present at the incident and tried, later, to make an identification of the suspects from memory. His ability to make an identification depends entirely upon his study of the two films. He has, in the process, saved you the trouble of carrying out an examination lasting over two hundred hours. However, the end result is that you are just as able to reach a conclusion about the critical few moments recorded in the black and white film as was DC A. DC A did not know either D1 or D2 before they were arrested and had no special expertise in the analysis of film. In effect he has passed on his experience of extensive viewing to you, and you are now in a position to assess whether he has made a correct identification of suspects '1' and '2'.

There is a special need for caution before convicting on this evidence of identification, either DC A's analysis or your own. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked, with DC A's assistance, to make a comparison between images and the person of someone who was until this trial a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspects '1' and '2' appear. They are all captured at night. The street lighting is quite good and the images are reasonably focused. They are, however, in black and white while the film with which you are invited to compare them is in colour and is of much better quality. Both films are of course only two-dimensional. The first question you need to consider is whether these black and white images are of sufficient quality to make any comparison with a defendant as depicted in the colour film. If you are not sure they are, then you should abandon the exercise altogether. If they are of sufficient quality then you have the further advantage of being able to make your comparison in your own time and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

I will now remind you of the evidence of DC A as it concerned D1. What you are being asked to note from the colour film and stills are the following features of D1's appearance, including his clothing.....Please turn, next, to the black and white stills numbered 1-4. You are invited to pay close attention to the following features of suspect '1' and his clothing....

Second, let us carry out the same exercise in relation to D2 and the black and white stills numbered 5-8.....

In each case you will need to consider whether there are features, both of build and facially, common to the suspect and the defendant which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line up of men of similar appearance. What you do have is the ability to search for any features of the suspect which you do not find in the defendant. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

It is submitted on behalf of the defendants that the exercise you are being asked to perform is capable of creating an injustice. It is pointed out that the composite black and white film is an edited version of the whole incident. You cannot, it is said, receive the full picture. There may be other people who took part in this violence who were of similar appearance to the defendants and wore similar clothing. This is a submission to which you should give close attention when you are reviewing the film. DC A told you he had viewed all the film available from both CCTV cameras and saw no other individuals with these combinations of features. Full copies of those films had been made available to the defence. DC A was not asked on behalf of either defendant to view an image of any other person who might have been mistaken for either of them.

If, having exercised the caution I have advised, you are sure that a defendant has been correctly identified by DC A you should proceed to consider whether that defendant is guilty of the offence charged. If you are not sure, that a defendant has been accurately identified, then you must find him not guilty. Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you see.

(4) Identification by facial mapping

Facial mapping is a developing technique and expertise. In its simplest form it amounts to little more than the comparison of one image with another.²³⁴ Computer software and photographic technology have created more advanced techniques which enable two separate images to be enhanced and aligned in order the better to make the comparison.²³⁵ The comparison will involve study of the proportions of the face, the juxtaposition of features of the face and its shape.²³⁶

The expert will be able to demonstrate similarities between the admitted control image of the defendant and the disputed crime scene photograph of the suspect, together with the absence of material differences. He cannot, however, express an opinion upon the probability that the suspect image is the defendant rather than someone else, because there exists no database against which the match probability can be measured. In the absence of such statistical aids the expert is limited to expressing an opinion based on his experience. The value of such evidence may be extremely limited. In any event the quality of the evidence may be limited by the experience and scientific objectivity of the expert.²³⁷

The question whether, in the absence of a relevant database, a facial mapping expert should be permitted to express his opinion upon the evidential value of his comparison between the image and the defendant's face was considered (see doubts expressed *obiter* in *Gray*²³⁸) in *Atkins*²³⁹. The Court of Appeal concluded that such evidence was permissible provided the experience and expertise of the expert justified the use of his own relative terms when seeking to interpret his results for the jury. Following a thorough review of the relevant cases Hughes LJ concluded as follows:

"29. The absence of a statistical database is something which will undoubtedly be exposed in cross-examination. The witness may expect to be asked to explain how, if no-one know how often ears or noses of the shape relied upon appear in the population at large, it is possible to say anything at all about the significance of the match; his answers may be satisfactory or unsatisfactory but will be there to be evaluated by the jury, which will have been reminded by the judge that any expert's expression of opinion is that and no more and does not mean that he is necessarily right. Similarly, the expert may be expected to be tested upon the extent to which he has not only looked for similarities, but has actively sought out dissimilarities. Those are but the simplest of the questions which plainly need to be asked of anyone offering evidence of this kind. Cross examination will also be informed by the fullest disclosure of his method, generally, and of his working notes in the particular case being tried.

30. In the present case, the judge's treatment of this evidence in summing up to the jury is agreed to have been meticulous and entirely fair if the disputed expression of opinion was admissible. As well as setting out in detail the extent and limitations of the evidence of Mr Neave, he made it wholly clear that it (i) was incapable of constituting positive identification, whilst it could positively exclude, (ii) involved no unique identifying feature in this case, (iii) was not based upon any database which could give any statistical foundation for his expression of opinion and (iv) was therefore, as to opinion of significance, informed by experience but entirely subjective. He also told the jury plainly that the decision whether to accept expert evidence

Footnotes

²³⁴ *Stockwell* [1993] 97 Cr App R 260

²³⁵ *Clarke* [1995] 2 Cr App R 425

²³⁶ *Hookway* [1999] Crim LR 750

²³⁷ *Gray* [2003] EWCA Crim 1001

²³⁸ *Supra*

²³⁹ [2009] EWCA Crim 1876

was for it and it alone. Without attempting to ordain a form of summing up which can fit every case, we observe that in some instances it may help the jury for the judge to explain that the forms of expression are labels applied by the witness to his opinion of the significance of his findings and different experts may not attach the same label to the same degree of comparability.

31. We conclude that where a photographic comparison expert gives evidence, properly based upon study and experience, of similarities and/or dissimilarities between a questioned photograph and a known person (including a defendant) the expert is not disabled either by authority or principle from expressing his conclusion as to the significance of his findings, and that he may do so by use of conventional expressions, arranged in a hierarchy, such as those used by the witness in this case and set out in paragraph 8 above [*no support, limited support, moderate support, support, strong support, powerful support*]. We think it preferable that the expressions should not be allocated numbers, as they were in the boxes used in the written report in this case, lest that run any small risk of leading the jury to think that they represent an established numerical, that is to say measurable, scale. The expressions ought to remain simply what they are, namely forms of words used. They need to be in an ascending order if they are to mean anything at all, and if a relatively firm opinion is to be contrasted with one which is not so firm. They are, however, expressions of subjective opinion, and this must be made crystal clear to the jury charged with evaluating them."

While there is no reason in principle why the jury should not convict upon the unsupported evidence of a facial mapping expert (since the jury can reach its own assessment of the match), a specific warning drawing attention to the absence of such support is important. If support exists it should be identified.

Illustration – facial mapping expert – extent of experience – methodology – expert’s conclusion that images of the same man – modified Turnbull direction – challenge to conclusion – absence of database from which to reach a statistical estimate of probability of a match – jury’s assessment of the evidence – supporting evidence

The prosecution case depends largely, but not exclusively, upon the evidence of Dr A. Dr A’s academic achievements were in biological science. She has since trained as a forensic scientist and for the last 10 years her area of expertise has been facial mapping. She has provided reports to the police and Crown Prosecution Service in about 100 cases and has given evidence in person in about 40 of those cases. Dr A told you that facial mapping evidence can take different forms. In this case we began with the preparation of images of the defendant taken in controlled circumstances with a digital camera at the police station. Second, Dr A was provided with the security CCTV film recovered from the Post Office. Dr A explained that her first task was to prepare views of the suspect from the Post Office film which most nearly matched the control sample for size and view. Using digital photographic technology and sophisticated computer software, Dr A was able to prepare two views from each set of photographs, one a frontal view of the face and the other a left profile. She then set about preparing the images in a form most advantageous for making a comparison. This was again achieved with computer software which was able to store the two images to be compared one on top of the other. By separating the images with a horizontal line on the screen Dr A was able to expose half of each image, the control image above and the Post Office image below the line. She then caused the line to move up the screen which exposed more of the Post Office image and less of the control image. Then she did the same in the opposite direction, exposing more of the control image and less of the Post Office image. Dr A demonstrated the same effect with the vertical line, which moved from side to side across the face. These exercises were carried out both with the frontal and profile views.

Dr A explained that her purpose was to demonstrate the continuity of features of the face. There was no point at which the regularity of features was broken by any noticeable discontinuity between one image and the other. She carried out measurements using a grid superimposed on each of the images. She measured the distance between each of the main features of the face and its position in relation to the others. She found that each image matched its counterpart both frontal and in profile. She told you that in her opinion there was sufficient detail to make a comparison of shape between the ears, nose, eyes and mouth in each image. Again she found, within the limits of quality of the Post Office images, that they matched the control image. Dr A was asked what conclusion she drew. She told you that the match was so exact that she concluded both sets of images were of the same man.

This is evidence of identification using scientific techniques. The defendant was unknown to Dr A. She is not, therefore, purporting to recognise someone she knew, nor has she, having observed the robbery, attempted to identify the robber at a line up of several individuals. Nevertheless, it is necessary for you exercise special caution before convicting the defendant upon Dr A's opinion. The reason is that experience tells us that two people can have a surprisingly similar appearance. Dr A has the advantage of scientific study of images rather than observation of a suspect in difficult circumstances, but that does not remove the need for caution.

Dr A was permitted to give evidence of her opinion because she is expert in scientific techniques with which we are not familiar. However, this is not a trial by expert. You must judge Dr A's evidence as you would any other witness, and decide whether you are sure she is right. That involves a consideration of her methodology and of her conclusions. Mr B gave evidence on behalf of the defendant. He too is an expert in facial mapping techniques. He visited the laboratory where Dr A carried out her work for the purpose of reviewing it. He accepted that the preparation of images for comparison was properly conducted and he did not dispute that the similarities identified by Dr A existed. What he did challenge was Dr A's ability to express the opinion that the separate images were of the same man. Dr A acknowledged that: (i) There is no database of physical features against which the chances of two different people having the same facial characteristics can be measured. Dr A cannot, therefore, tell you what is the statistical chance that these images may be from two different people (ii) There is no feature in the Post Office images and the control image of the defendant which can be described as unique. When Dr A expresses her opinion that the images are of the same man she is relying solely upon her experience in this area which is limited to 100 or so earlier cases; being her opinion it is entirely subjective.

While you are entitled to give weight to Dr A's opinion, if you conclude that it is right to do so, you should not conclude that she has scientifically excluded the possibility that the face in the Post Office images is that of the defendant and no-one else. Her opinion plainly cannot have that effect. It is for you to evaluate Dr A's evidence. As she pointed out, and Mr B accepted, her opinion is based only upon scientific assessment of measurement and shape, while you have the ability to make an assessment of the similarity in overall facial appearance. In this context, within the limitations imposed by the Post Office image, neither Dr A nor Mr B were able to find any feature which was different from the defendant's face. When you make your own comparison, please remember the warning I have given that caution is required. Mistakes can be made even about those whose faces are familiar to us.

If you have any rational doubt about the correctness of Dr A's opinion, based upon a consideration of the expert evidence and upon your own assessment of these images then you must find the defendant not guilty. However, you are not expected to make that judgment in isolation from all the other evidence in the case. I will remind you in a moment of the evidence which is capable of supporting Dr A's conclusion although, as I shall emphasise, the judgment whether it does provide support is for you to make.

Sources

Archbold 14-45/51; Blackstone F18.2

(3) Identification by finger and other prints

Finger and Palm Prints²⁴⁰

A match by an expert of fingerprint impressions left at the scene of crime and the defendant's fingerprint impressions have been admissible in evidence for at least one hundred years.²⁴¹ In *Buckley*²⁴² the Vice-President, Rose LJ, described the history of fingerprint standards and gave guidance on current minimum requirements:

"It has long been known that fingerprint patterns vary from person to person and that such patterns are unique and unchanging throughout life. As early as 1910, in *R v Castleton* 3 Cr App R 74, a conviction was upheld which depended solely on identification by fingerprints. At that time there were no set criteria or standards. But, gradually, a numerical standard evolved and it became accepted that once 12 similar ridge characteristics could be identified, a match was proved beyond all doubt.

In 1924, the standard was altered by New Scotland Yard, but not by all other police forces, so as to require 16 similar ridge characteristics. That alteration was made because, in 1912, a paper had been published in France by a man called Alphonse Bertillon. It was on the basis of his paper that the 16 similar ridge characteristics standard was adopted. However, in recent times, the originals of the prints used by Bertillon have been examined and revealed conclusively to be forgeries. It is therefore apparent that the 16 point standard was adopted on a false basis.

Meanwhile, in 1953, there was a meeting between the then Deputy Director of Public Prosecutions, officials from the Home Office and officers from several police forces, with a view to agreeing on a common approach. As a result, the National Fingerprint Standard was created, which required 16 separate similar ridge characteristics.

It is apparent that the committee were not seeking to identify the minimum number of ridge characteristics which would lead to a conclusive match, but what they were seeking to do was to set a standard which was so high that no one would seek to challenge the evidence and thereby, to raise fingerprint evidence to a point of unique reliability.

At the same time, a National Conference of Fingerprint Experts was established to monitor the application of the standard. Shortly afterwards, there was an amendment to the standard, to provide that, where at any scene there was one set of marks from which 16 ridge characteristics could be identified, any other mark at the same scene could be matched if ten ridge characteristics were identified. Logical or otherwise, that system operated for many years.

During the passage of time, there have, of course, in this area, as in the realms of much other expert evidence, been developments in knowledge and expertise. Of course, in practice, many marks left at the scene of a crime are not by any means perfect; they may be only partial prints;

Footnotes

²⁴⁰ The taking of fingerprints and other non-intimate skin samples is governed by the Police and Criminal Evidence Act 1984, section 63, and Code D paragraphs 6.5/6

²⁴¹ *Castleton* [1910] 3 Cr App R 74 (appeal November 1909), in which the Court of Criminal Appeal refused leave to appeal against conviction when the sole evidence of identification was a match, proved by an expert fingerprint examiner, between a print left on a candle at the scene and the defendant's impressions

²⁴² Transcript 30 April 1999, 163 JP 561

they may be smudged or smeared or contaminated. However, a consensus developed between experts that considerably fewer than 16 ridge characteristics would establish a match beyond any doubt. Some experts suggested that eight would provide a complete safeguard. Others maintained that there should be no numerical standard at all. We are told, and accept, that other countries admit identifications of 12, 10, or eight similar ridge characteristics and, in some other countries, the numerical system has been abandoned altogether.

In 1983, there was a conference which recognised that all fingerprint experts accepted that a fingerprint identification is certain with less than the current standard of 16 points of agreement. It was also recognised that all experts agreed that there should be a nationally accepted standard, which should be adhered to in all but the most exceptional cases. The Conference recognised that there would be rare occasions where an identification fell below the standard, but the print was of such crucial importance in the case that the evidence about it should be placed before the Court. Therefore the conference advised that, in such extremely rare cases, the evidence of comparison should be given only by an expert of long experience and high standing.

It was this approach which led to the trial judge in *R v Charles* (unreported, Court of Appeal (Criminal Division) transcript of 17th December 1998) admitting evidence of 12 similar ridge characteristics. That was a decision, in the exercise of his discretion, which was upheld in the face of challenge in this Court. In the course of giving the judgment of the Court on that occasion, the Lord Chief Justice, Lord Bingham of Cornhill, said this at page 9E of the transcript, by reference to the evidence of factual match with the defendant's print:

"It was not suggested that there were differences between the two prints being compared; nor was it suggested that the similarities on which he relied did not exist. It was not, in other words, any part of the appellant's case that the prints did not match. Nor was any contradictory evidence of any kind adduced at the trial. The appellant did not call a fingerprint expert who disagreed with anything that Mr Powell said."

The learned Lord Chief Justice went on to refer to the expert's opinion evidence that the relevant print was made by the defendant. The expert:

"...relied on the comparison between them, on the similarities and absence of dissimilarities, on his professional experience during a long career, and on his expert knowledge of the experience of other experts as reported in the literature. He concluded that the possibility of the disputed print and the control prints being made by different people could in his judgment be effectively ruled out.

In cross examination...he agreed that he was expressing a professional opinion and not a scientific conclusion."

It is further to be noted that in *R v Giles*, (unreported, Court of Appeal (Criminal Division) transcript, dated 13th February 1988) a differently constituted division of this Court over which Otton LJ presided, refused a renewed application for leave to appeal against conviction. The trial judge's exercise of discretion, in admitting evidence of one print of which there were 14 similar characteristics and of one with only eight similar characteristics, was not regarded as being the subject of effective challenge.

It is pertinent against that background to refer to current developments so far as fingerprint experts are concerned. It was recognised that, in view of the 1983 concessions to which we have referred,

the 1953 standard was logically indefensible. In 1988, the Home Office and ACPO (The Association of Chief Police Officers) commissioned a study by Drs Evett and Williams into fingerprint standards. They recommended that there was no scientific, logical or statistical basis for the retention of any numerical standard, let alone one that required as many as 16 points of similarity.

In consequence, ACPO set up a series of committees to consider regularising the position and to ensure that, if fingerprint identifications based on less than 16 points were to be relied upon, there would be clear procedures and protocols in place to establish a nationwide system for the training of experts to an appropriate level of competence, establishment of management procedures for the supervision, recording and monitoring of their work and the introduction of an independent and external audit to ensure the quality of the work done. In 1994 an ACPO report produced under the chairmanship of the Deputy Chief Constable of Thames Valley Police recommended changing to a non numerical system and the Chief Constable's Council endorsed that recommendation in 1996. Further discussions followed between the heads of all the Fingerprint Bureau in this country and ACPO. In consequence, a Fingerprint Evidence Project Board was established with a view to studying exhaustively the systems needed before moving nationally to a non numerical system. The first report of that body was presented on 25th March 1998 and recommended that the national standard be changed entirely to a non numerical system: a target date of April 2000 was hoped for, by which the necessary protocols and procedures would be in place.²⁴³ If and when that occurs, it may be that fingerprint experts will be able to give their opinions unfettered by any arbitrary numerical thresholds. The courts will then be able to draw such conclusions as they think fit from the evidence of fingerprint experts.

It is to be noted that none of this excellent work by the police and by fingerprint experts can be regarded as either usurping the function of a trial judge in determining admissibility or changing the law as to the admissibility of evidence.

That said, we turn to the legal position as it seems to us. Fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. It may so tend, even if there are only a few similar ridge characteristics but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value. When the prosecution seek to rely on fingerprint evidence, it will usually be necessary to consider two questions: the first, a question of fact, is whether the control print from the accused has ridge characteristics, and if so how many, similar to those of the print on the item relied on. The second, a question of expert opinion, is whether the print on the item relied on was made by the accused. This opinion will usually be based on the number of similar ridge characteristics in the context of other findings made on comparison of the two prints.

That is as matters presently stand. It may be that in the future, when sufficient new protocols have been established to maintain the integrity of fingerprint evidence, it will be properly receivable as a matter of discretion, without reference to any particular number of similar ridge characteristics. But, in the present state of knowledge of and expertise in relation to fingerprints, we venture to proffer the following guidance, which we hope will be of assistance to judges and to those involved in criminal prosecutions.

Footnotes

²⁴³ On 11 May 2001 the Chief Constables' Council endorsed the recommendation to implement the change to evidential standard for fingerprints. A Rationale (Appendix A) was issued together with a statement of process (Appendix B) and briefing and guidance notes for fingerprint experts prepared by the Project Board to which Rose LJ referred in his judgment.

If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular:

- (i) the experience and expertise of the witness;
- (ii) the number of similar ridge characteristics;
- (iii) whether there are dissimilar characteristics;
- (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and
- (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination.

In every case where fingerprint evidence is admitted, it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence of opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in the light of all the evidence." [bold emphasis added]

Since this advice was given the police fingerprint bureaux in England and Wales have adopted a non-numerical standard.²⁴⁴ It is suggested that the guidance provided in *Buckley* remains valid but admissibility will depend primarily on the quality of the opinion and the matching characteristics which support it.

- Once the evidence is admitted, the jury's conclusion upon the cogency of the evidence of match will also depend on the factors listed by the Vice-President.
- Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that a dissimilar characteristic exists, it will exonerate the defendant.
- The second question is the significance of the match. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses his conclusion and the experience on which it is based will be critical.

Footnotes

²⁴⁴ See previous footnote

Prints of the Human Foot²⁴⁵

A foot print is not capable of providing conclusive evidence of identity since the comparison does not depend upon the minutiae of unique ridge characteristics but upon the general size, shape and contours of the foot, together with the juxtaposition of its features. The print may be left by a bare or stockinged foot and the comparison is usually demonstrated by the use of an overlay. Directions to the jury concerning the exactness and the limitations of the match will follow a similar pattern to those required for fingerprints. It is unusual to obtain a scene of crime print of such clarity and completeness that an exact match even of these general features can be made. Even if an exact match is obtained it is incapable of excluding others as donor of the crime print. At most it will place the defendant among a large group of individuals who could have left the mark and the jury should be so directed. The evidence of the expert as to the significance of the match will therefore require close attention.

Ear Prints

While there is no reason in principle why ear print comparison should not be used as an aid to identification, there are particular difficulties associated with it. In *Dallagher*²⁴⁶ the Court of Appeal accepted that evidence of ear print comparison was admissible but allowed the appeal on the ground of fresh expert evidence which tended to undermine the confidence with which the match and its significance were expressed. At the re-trial ordered, the prosecution offered no evidence. A swab taken at the point at which the scene of crime print was left produced a DNA profile which excluded the defendant as the donor of the DNA material.

In *Kempster (No 2)*²⁴⁷ the appellant successfully challenged his conviction for burglary arising from the identification of an ear print left near the point of entry. In giving the judgment of the Court, Latham LJ gave a helpful description of techniques for lifting and comparing ear prints, and warned against placing undue weight on an apparent match found in the shape and gross features of the ear. He summarised the evidence received in the appeal as follows:

25. Dr Ingleby's criticisms fell essentially into three parts. First, he sought to demonstrate to us that even a comparison of the prints as overlaid by Miss McGowan showed a mismatch which in his view was significant, in other words was not one which was explained by difference of pressure, or movement. Second, he produced his own transparencies in which the impressions left by the ear were differently coloured on each transparency, so as to accentuate, as he submitted, the discrepancies between the two prints. Thirdly, he said that in any event the prints were of such quality that only what he described as the gross detail was visible and could be compared, that is the main cartilaginous folds, whereas the work with which he had been connected established in his view that the only reliable indicators for a match were what he described as the minutiae. These are the small anatomical features such as notches, nodules or creases in the ear structure. There were, in his view, only two such minutiae apparent from the prints in question, namely a nodule and a notch on the upper rim of the helix, which is the outside rim of the ear. Careful measurement, he submitted, showed that the distance between the two was different on the print from the scene and the print from the appellant.

Footnotes

²⁴⁵ The taking of fingerprints and other non-intimate skin samples is governed by the Police and Criminal Evidence Act 1984, section 63, and Code D paragraphs 6.5/6

²⁴⁶ [2003] 1 Cr App R 12, [2002] EWCA Crim 1903

²⁴⁷ [2008] 2 Cr App R 19, [2008] EWCA Crim 975

26. Miss McGowan adhered to her view that the two prints showed a match which justified her conclusion that the print at the scene had been made by the appellant. She pointed out that the shape and size of the ears that made the prints were so closely matched that any small difference could be explained by a variation in pressure. The apparent mismatches pointed out by Dr Ingleby were, she said, again entirely explicable by differences in pressure, and differences in the way in which the two transparencies were overlaid. As far as minutiae were concerned, she pointed out that the notch and the nodule were in themselves unusual features and were identically placed on the helix, the difference in measurement being one which depended upon precisely where on the notch and the nodule the measuring point was placed. Even if there was, as Dr Ingleby had concluded, a difference in the distance between the two, that difference was only between 2.2 millimetres and 2.5 millimetres, in other words again entirely explicable by a variation, for example in pressure.

27. It is clear, particularly from the evidence of Dr Ingleby, that ear-print comparison is capable of providing information which could identify the person who has left an ear-print on a surface. That is certainly the case where minutiae can be identified and matched. Where the only information comes from the gross features, we do not understand him to say that no match can ever be made, but there is likely to be less confidence in such a match because of the flexibility of the ear and the uncertainty of the pressure which will have been applied at the relevant time. **Miss McGowan still remains of the view that gross features are capable of providing a reliable match.**

28. **On the basis of the evidence that we have heard, we are of the view that the latter can only be the case where the gross features truly provide a precise match. We have no doubt that evidence of those experienced in comparing ear-prints is capable of being relevant and admissible. The question in each case will be whether it is probative. In the present case, having heard both Dr Ingleby and Miss McGowan, and in particular having seen the various prints from which comparisons have been made, we are struck by the gross similarity of the shape and size of the ear-prints used for the comparison, and by the close similarity of the notch and the nodule on each. This, in our view, establishes that the ear-print at the scene is consistent with having been left by the appellant. But having examined the comparisons of the gross features, it is also apparent to us that they do not provide a precise match. The differences may well be explicable by differences in pressure, or movement, but the extent of the mismatch is such as to lead us to the conclusion that it could not be relied on by itself as justifying a verdict of guilty."** [Bold emphasis added]

Ear print comparison suffers a disadvantage in common with facial mapping (see Chapter 7 (2) Identification by CCTV and Other Images, (4) Identification by Facial Mapping). While there is general agreement among experts that no two ears are the same, it is virtually impossible to obtain an ear impression which contains all relevant features of the ear. The crime scene impression is also likely to have been subject to variations in pressure and to at least minute movement, either of which will affect the reliability of the detail left. The scope for a significant number of reliable features for comparison is therefore limited and even if there is a match between them there is no means of assessing the statistical probability that the crime scene impression was left by someone other than the defendant.

Directions to the jury will require a warning about the limitations of the technique and the conclusions which can be drawn from the comparison. All that can be derived from the comparison is the conclusion that the defendant is one of an unknown number of people who could have left the mark. The jury should be told that they could not convict the defendant on the ear print identification alone.

Sources

Archbold 14-53/55; Blackstone F18.31, F18.33/34

(4) Identification by Voice

Introduction

Northern Ireland

1. In *O'Doherty*²⁴⁸ the Northern Ireland Court of Appeal considered an appeal against conviction for aggravated burglary. A significant part of the evidence for the prosecution comprised a tape recorded telephone call between the suspect and the emergency services. The trial judge directed the jury that they could consider the following evidence as to the identity of the caller:
 - (1) Recognition of the voice by a police officer who knew the defendant;
 - (2) Opinion evidence of a voice expert;
 - (3) The jury's own comparison of the suspect's speech with the defendant's speech.
2. Voices and speech can be compared by the expert listener (auditory phonetic analysis) and by acoustic recording and measurement (quantitative acoustic analysis). The Court considered evidence that it was generally accepted among experts that the inexpert listener could not alone make a reliable comparison of voice and should only attempt it with the assistance of an expert. An expert's evidence would enable the jury to identify relevant similarities in accent or dialect but that is not generally enough to make an identification. All that auditory phonetic analysis can achieve is a judgment that the defendant is among those who could have used the disputed speech. The reason for this is that "Phonetic analysis does not purport to be a tool for describing the difference between one speaker and another, the differences which arise from the vocal mechanisms. The way in which we hear will fail to distinguish quite a number of the features which are important in deciding whether samples came from two speakers or one."²⁴⁹ Accordingly, it was generally accepted that quantitative acoustic analysis was an essential requirement of professional analysis of voices.
3. The Court reached conclusions as to the use of voice identification evidence in general as follows:

"59.....in the present state of scientific knowledge no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis such as is used by Dr Nolan, Dr French and all but a small percentage of experts in the United Kingdom and by all experts in the rest of Europe, which includes formant analysis.

60. We make three exceptions to this general statement. Where the voices of a known group are being listened to and the issue is, "which voice has spoken which words" or where there are rare characteristics which render a speaker identifiable—but this may beg the question—or the issue relates to the accent or dialect of the speaker (see *R. v Mullan* [1983] N.I.J.B. 12) acoustic analysis is not necessary...."

Footnotes

²⁴⁸ [2003] 1 Cr App R 5

²⁴⁹ §28

4. Evidence of voice recognition was admissible and, if admitted²⁵⁰:

“It seems to us that.... the jury should be allowed to listen to a tape-recording on which the recognition is based, assuming that the jury have heard the accused giving evidence. It also seems to us that the jury may listen to a tape-recording of the voice of the suspect in order to assist them in evaluating expert evidence and in making up their own minds as to whether the voice on the tapes is the voice of the defendant.”

5. Of the practice of inviting juries to make their own voice comparison for the purpose of assessing an identification by recognition or by an expert the Court said:

“65. We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on the tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasise the need to give a specific warning to the jurors themselves.”

England and Wales

6. In *Flynn and St John*²⁵¹ the Court of Appeal of England and Wales considered evidence of voice recognition by police officers. It was the prosecution case that the defendants were to be heard in a covertly recorded conversation. The officers were permitted to give evidence identifying what each defendant said to the other during the conversation, which implicated them in a conspiracy to rob. The defendants denied that their voices were to be heard. The Court heard expert evidence and described its effect as follows²⁵²:

“16. In general terms the expert evidence before us demonstrates the following:

(1) Identification of a suspect by voice recognition is more difficult than visual identification.

(2) Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification.

(3) The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:

Footnotes

²⁵⁰ §63

²⁵¹ [2008] 2 Cr App R 20, [2008] EWCA Crim 970

²⁵² §16

- (i) the quality of the recording of the disputed voice or voices;
- (ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
- (iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person.
- (iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.
- (v) the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong. One study used telephone speech and involved fourteen people representing three generations of the same family being presented with speech recorded over both mobile and land line telephones. The results showed that some listeners produced mis-identifications, failing to identify family members or asserting some recordings did not represent any member of the family. The study used clear recordings of people speaking directly into the telephone.

(4) Dr Holmes states that the crucial difference between a lay listener and expert speech analysis is that the expert is able to draw up an overall profile of the individual's speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. In contrast, the lay listener's response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the speaker's speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener's voice recognitions will make it more difficult to challenge the accuracy of their evidence."

7. The Court held that the evidence should not have been admitted on the principal ground that the covert recording was not of sufficient quality for voice recognition to be made by the witnesses. Furthermore, the evidence should have excluded under section 78 Police and Criminal Evidence Act 1984 because inadequate steps had been taken to ensure the integrity of the recognition process²⁵³:

"First, in our opinion, when the process of obtaining such evidence is embarked on by police officers it is vital that the process is properly recorded by those officers. The amount of time spent in contact with the defendant will be very relevant to the issue of familiarity. Secondly, the date and time spent by the police officer compiling a transcript of a covert recording must be recorded. If the police officer annotates the transcript with his views as to which person is speaking, that must be noted. Thirdly, before attempting the voice recognition exercise the police officer should not be supplied with a copy of a transcript bearing another officer's annotations of whom he believes is speaking. Any annotated transcript clearly compromises the ability of a subsequent listener to reach an independent opinion. Fourthly, for obvious reasons, it is highly desirable that such a voice recognition exercise should be carried out by someone other than an officer investigating the offence. It is all too easy for an investigating officer wittingly or unwittingly to be affected by knowledge already obtained in the course of the investigation."

Footnotes

²⁵³ §53

8. Gage LJ added general observations. The Court would not follow the Court of Appeal in Northern Ireland in its view that voice recognition should never be admitted without expert acoustic analysis. Such a finding appeared to be out of step with the judgment of the Court in *Attorney General's Reference (No 2 of 2002)*²⁵⁴ concerning visual recognition from films or photographs but the Court had a warning to give about the use of such evidence and the need for an explicit modified *Turnbull* direction to the jury:

"62. As appears from the above we have been dealing in these appeals with issues arising out of voice recognition evidence. Nothing in this judgment should be taken as casting doubt on the admissibility of evidence given by properly qualified experts in this field. On the material before use we think it neither possible nor desirable to go as far as the Northern Ireland Court of Criminal Appeal in O'Doherty which ruled that auditory analysis evidence given by experts in this field was inadmissible unless supported by expert evidence of acoustic analysis. So far as lay listener evidence is concerned, in our opinion, the key to admissibility is the degree of familiarity of the witness with the suspect's voice. Even then the dangers of a mis-identification remain; the more so where the recording of the voice to be identified is poor.

63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, as outlined above, great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.

64. It goes without saying that in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases." [Bold emphasis added]

Directions

There are two separate areas of concern.

- The first is voice recognition by someone familiar with the voice of the defendant. In *Hersey*²⁵⁵, the defendant was charged with robbery. V thought he recognised the voice of one of the robbers as one of his customers, H. The police carried out a voice comparison exercise in which H and eleven volunteers read the same text. V identified the defendant. The court approved the procedure and encouraged the use of safeguards and warnings to the jury as near to those employed following *Turnbull* as the adaptation would permit. The possible dangers and precautions which may minimise them were described by Gage LJ in *Flynn and St John* (see paragraphs 16(2), (3) and (4), 63 and 64 of the judgment above). He did not refer to the desirability of a voice comparison exercise such as that performed in *Hersey*. However, the absence of such a procedure would be a matter for comment by the trial judge.

Footnotes

²⁵⁴ [2003] 1 Cr App R 21 (See (2) Identification by CCTV and Other Visual Images)

²⁵⁵ [1999] Crim LR 281

- The second area of concern is the use of expert evidence based solely upon auditory analysis without recourse to acoustic analysis. While, unlike the practice in Northern Ireland, the courts of England and Wales are prepared to receive such evidence, its limitations were described in *O'Doherty* (see above) as being unable to distinguish between the vocal mechanisms of voices. It is likely to be the subject of criticism by an expert called on behalf of the defence and directions will need to be tailored to the evidence in the case.

Sources

Archbold 14-52/52c; Blackstone F18.30

(5) Identification by DNA

Introduction²⁵⁶

Glossary:

<i>Allele:</i>	One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.
<i>Allele 'drop in':</i>	An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. Known as a "stochastic effect" of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).
<i>Allele 'drop out':</i>	An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a "stochastic effect" of LCN as above.
<i>DNA:</i>	Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.
<i>DNA Profile:</i>	Is made up of target regions of DNA codified by the number of STR (see below) repeats at each locus.
<i>Electrophoresis:</i>	The method by which the DNA fragments produced in STR are separated and detected.
<i>Electrophoretogram:</i>	The result of electrophoresis produced in graph form
<i>Locus/loci:</i>	Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.
<i>Low Template DNA/ Low Copy Numbering:</i>	By increasing the number of PCR (see below) cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample.
<i>Masking:</i>	When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair "masks" the other.
<i>Mixed Profile:</i>	Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.
<i>NDNAD:</i>	National DNA Database
<i>PCR:</i>	Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.

Footnotes

²⁵⁶ The taking of body samples is governed by the Police and Criminal Evidence Act 1984, sections 62-63A, as amended, and by Code D paragraph 6

<i>SGM Plus</i> ®:	Second Generation Multiplex Test: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.
<i>STR</i> :	Short tandem repeat, where a part of the DNA molecule repeats. Comparison of the pattern or blocks produced is the modern form of DNA profiling, in use since the 1990s.
<i>Stutter</i> :	The PCR amplification of tetranucleotide short tandem repeat (STR) loci typically produces a minor product band shorter than the corresponding main allele band; this is referred to as the stutter band or shadow band. They are well known and identified by analysts.
<i>Voids</i> :	A locus at which no alleles are found in the crime specimen probably through degradation of the material. The defendant may say that the alleles which should have been there might have excluded him.

Profiling DNA material

Different regions or 'loci' in the DNA chain contain repeated blocks of 'alleles'. Modern analysis concentrates on 10 loci in the chain which are known to contain alleles which vary widely between individuals, one contributed by each parent. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis. Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci

Low template DNA is the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis. Both the lack of validation for the technique and the danger of contamination were criticised by Weir J in the Omagh bombing case of *Hoey*²⁵⁷ leading to the exclusion of the evidence. As a result, the Forensic Science Regulator commissioned a review by a team of experts which, in April 2008, while making recommendations, reached favourable conclusions both as to method and as to precautions taken in UK laboratories against contamination.²⁵⁸ The state of the science was thoroughly reviewed by the Court of Appeal in England and Wales in *Reed, Reed and Garmson*²⁵⁹. Thomas LJ expressed the conclusion of the court as follows:

"74. On the evidence before us, we consider we can express our opinion that it is clear that, on the present state of scientific development:

- i) Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer from stochastic effects (such as allelic drop out mentioned at paragraph 48) which prevent proper interpretation of the alleles.
- ii) There is no agreement among scientists as to the precise line where the stochastic threshold should be drawn, but it is between 100 and 200 picograms.

Footnotes

²⁵⁷ [2007] NICC 49

²⁵⁸ http://police.homeoffice.gov.uk/publications/operational-policing/Review_of_Low_Template_DNA_12835.pdf?view=Binary

²⁵⁹ [2009] EWCA Crim 2698

- iii) Above that range, the LCN process used by the FSS can produce electrophoretograms which are capable of reliable interpretation. There may, of course, be differences between the experts on the interpretation, for example as to whether the greater number of amplifications used in this process has in the particular circumstances produced artefacts and the effect of such artefacts on the interpretation. Care may also be needed in interpretation where the LCN process is used on larger quantities than that for which it is normally used. However a challenge to the validity of the method of analysing Low Template DNA by the LCN process should no longer be permitted at trials where the quantity of DNA analysed is above the stochastic threshold of 100-200 picograms in the absence of new scientific evidence. A challenge should only be permitted where new scientific evidence is properly put before the trial court at a Plea and Case Management Hearing (PCMH) or other pre-trial hearing for detailed consideration by the judge in the way described at paragraphs 129 and following below.
- iv) As we have mentioned, it is now the practice of the FSS to quantify the amount of DNA before testing. There should be no difficulty therefore in ascertaining the quantity and thus whether it is above the range where it is accepted that stochastic effects should not prevent proper interpretation of a profile.
- v) There may be cases where reliance is placed on a profile obtained where the quantity of DNA analysed is within the range of 100-200 picograms where there is disagreement on the stochastic threshold on the present state of the science. We would anticipate that such cases would be rare and that, in any event, the scientific disagreement will be resolved as the science of DNA profiling develops. If such a case arises, expert evidence must be given as to whether in the particular case, a reliable interpretation can be made. We would anticipate that such evidence would be given by persons who are expert in the science of DNA and supported by the latest research on the subject. We would not anticipate there being any attack on the good faith of those who sought to adduce such evidence."

The judgment is a valuable source of information upon the following topics: (1) the technique of conventional DNA analysis (paras. 30-43), (2) the technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects (paras. 44-49), (3) match probability (paras. 52-55), (4) expert evidence of the manner and time of transfer of cellular material (paras. 59-61; 81-103; 111-127), (5) the procedural requirements of CPR 33 for the admission of expert evidence (paras. 128-134), (6) analysis of mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing up (paras 18-25; 178-215)

Interpretation of Results

Interpretation is a matter for expertise. The analyst is comparing the blocks of alleles at each locus as identified from the crime specimen with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database of 400 profiles. If a match is obtained at each of the 10 loci a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison the less discriminating will be the match probability.

Match Probability

The "random occurrence ratio" (or "match probability") is the statistical frequency with which the match in profile between the crime scene sample and someone unrelated to the defendant will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than the defendant was the donor of the crime scene sample is effectively

eliminated. This significantly reduces the risk that the ‘prosecutor’s fallacy’ will creep into the evidence or have any effect upon the outcome of the trial.²⁶⁰

The Prosecutor’s Fallacy

The ‘prosecutor’s fallacy’ confused the random occurrence ratio with the probability that the defendant committed the offence. In *Doheny and Adams*²⁶¹ Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.

Mixed and Partial Profiles

It will be recalled that each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is a matter for expert examination and analysis. The presence of mixed profiles allows the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graphic profile, may mask an allele from a minor contributor.

There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called ‘voids’. The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group who could have left the specimen at the scene. In statistical terms a matching but partial profile will increase the number of people who could have left their DNA at the scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in *Bates*.²⁶² The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and admissible in evidence provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the ‘voids’.

Procedural Requirements

The Court in *Doheny and Adams* heard evidence from experts on both sides as to the appropriate method of statistical calculation used to produce the random occurrence ratio. Its focus was upon the question whether the match probability for each of several matching bands in two separate tests (single and multi-locus probes) could be multiplied to arrive at the random occurrence ratio. The answer was negative because the scientists could not eliminate the possibility that the results obtained from each test replicated or overlapped one another. The result was detailed guidance from the Court as to the way in which such evidence should be presented and handled at trial. In *Reed, Reed and Garmson*²⁶³ at paragraphs 128-134 the Court emphasised

Footnotes

²⁶⁰ Gray [2005] EWCA Crim 3564 at §§21-22

²⁶¹ [1997] 1 Cr App R 369

²⁶² [2006] EWCA Crim 1395. The judgment of the court, given by Moore-Bick LJ, is a useful reference work for a description of modern practice in DNA analysis

²⁶³ Headnote [1997] 1 Crim App R 369-370

the importance of pre-trial preparation and management and the role of CPR 33. At paragraph 131 Thomas LJ said:

“131 In cases involving DNA evidence,

- i) It is particularly important to ensure that the obligation under Rule 33.3(1)(f) and (g) is followed and also that, where propositions are to be advanced as part of an evaluative opinion (of the type given by Valerie Tomlinson in the present case), that each proposition is spelt out with precision in the expert report.
- ii) Expert reports must, after each has been served, be carefully analysed by the parties. Where a disagreement is identified, this must be brought to the attention of the court.
- iii) If the reports are available before the PCMH, this should be done at the PCMH; but if the reports have not been served by all parties at the time of the PCMH (as may often be the case), it is the duty of the Crown and the defence to ensure that the necessary steps are taken to bring the matter back before the judge where a disagreement is identified.
- iv) It will then in the ordinary case be necessary for the judge to exercise his powers under Rule 33.6 and make an order for the provision of a statement.
- v) We would anticipate, even in such a case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under Rule 33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoretograms or the evaluative opinion that is to be given.
- vi) If the order as to the provision of the statement under Rule 33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason.

132 This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury.”

The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by section 127 Criminal Justice Act 2003. Rules made for the Crown Court were contained in CPR 24 and 33. As from October 2009 rule 33 has been re-cast and now incorporates former rule 24.²⁶⁴

Footnotes

²⁶⁴ See Chapter 8 Expert Evidence below

Directions

In *Doheny and Adams*²⁶⁵ Phillips LJ continued:

“11. In the summing-up careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.

12. The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.

13. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts of the particular case: “Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.”²⁶⁶

Advances in the sensitivity of DNA analysis have been such that nowadays when a full profile has been obtained the match probability will be so low that the defendant will concede that he was the donor of the sample taken from the scene. The summing up will concentrate on an explanation given by the defendant for his presence at the scene.

Controversy is more likely to arise in expert assessment of the significance of mixed and incomplete profiles. The trial judge will need to be aware of and explain to the jury the difference between results which are capable of bearing a match probability (and, if so, how it should be expressed in the light of the analysis) and those matches which, while not statistically significant, do not exclude the defendant as the source. These were issues which arose in the appeal of *Garmson*²⁶⁷.

The Illustration below represents an example of placing inconclusive DNA evidence into the context of a circumstantial case so that the jury understands its limitations.

Footnotes

²⁶⁵ [1997] 1 Cr App R 369

²⁶⁶ In *Adams* (No 2) [1998] 1 Cr App R 377 the Court of Appeal considered a second appeal by Mr Adams following his conviction after a re-trial. This time the DNA evidence was statistically even stronger. The judgment of Lord Bingham CJ is interesting for its references to the defence’s application of Bayes Theorem to calculate probabilities relating to the non-DNA and non-scientific evidence.

²⁶⁷ [2009] EWCA Crim 2698. See paras 18-25; 178-215

Illustration – murder of deceased in her bedroom - full, partial and mixed profiles – explanation of significance – statistical probabilities – interpretation of DNA results – defendant admits presence but denies murder

The DNA evidence is not in dispute. However, the conclusions you reach from it are very much in issue.

Cause of death

Ms A was found dead in her bed by a neighbour at about 9am on Sunday 17 May. The cause of death was blows to the head with a blunt instrument. A bloodstained baseball bat was found on the bed. The forensic pathologist has given evidence that the baseball bat could have caused all the injuries suffered by Ms A from which she died sometime during Saturday night or early Sunday morning.

Admitted contact between the deceased and the defendant

The defendant admits that during the early evening of Saturday, he and Ms A had sexual intercourse in the main bedroom of her two bedroom flat. Semen obtained from swabs taken from Ms A's vagina after her death was analysed by the forensic scientist, Mr B, and found to contain what Mr B described as a full match between the specimen and the defendant's DNA. The defendant gave evidence that he and Ms A afterwards smoked cigarettes in the bedroom. As you have seen from the photographs, cigarette butts were recovered from ashtrays on each side of the bed. The tips were swabbed for saliva and the swabs were analysed for DNA. From the swabs recovered from one side of the bed, Mr B obtained a full DNA profile which matched the profile of Ms A; from the swabs obtained from the other side of the bed he obtained a full DNA profile which matched the profile of the defendant. Mr B noted that some of the cigarette butts and the ashtrays on each side of the bed had been spattered with tiny flecks of blood. He concluded that the evidence supported the defendant's account in interview that he had smoked in the bedroom with Ms A before she was killed.

Case for prosecution and defence

The prosecution case is that the defendant was her killer. The prosecution relies upon the further DNA evidence of Mr B concerning what he found on two further items, Ms A's purse and the baseball bat. The defendant's evidence was that when he left Ms A at 9pm she was alive and sleeping in her bed. When he was in Ms A's bedroom he was unaware of the presence of either a baseball bat or a purse and he certainly did not handle them.

DNA analysis, comparison and statistical evaluation

It is important that we understand what Mr B meant by a full DNA profile and a full DNA match. DNA profiling has been part of the forensic scientist's tools for over 20 years now. I have no doubt you will have heard and read about its capabilities in the media. There are various ways in which it can be explained. We as individuals are made up of cells. DNA is the chemical in our cells which determines who we are. We inherit one half of our DNA from each parent. The more closely related you are the more similar your DNA will be. But apart from identical twins we are all different. So far, science has not succeeded in compiling a complete DNA profile for you or me so it is important to understand what forensic scientists mean by a full DNA profile.

As Mr B explained, he concentrates on 10 specific areas (the scientists call them 'loci') of the DNA chain which are known to vary widely between people. The 11th area is the sex indicator, the XX or XY chromosome. For each of those 10 loci except for one there is a component provided by dad and another provided by mum. In one of them the component provided by dad and mum is identical. That is why Mr B explained that forensic scientists were looking at 19 components in each profile. Each component at each locus is represented by a number and the number is called by the scientists an "allele".

Full and partial profiles

So, if Mr B and his colleagues find what they call a full profile they have found a match in those 19 alleles in different loci which are known to vary widely between individuals, and they have determined that both profiles come from either a male or female. Because the Forensic Science Service uses a database of 400 known profiles taken from a wide range of individuals they are able to calculate the probability that a profile being examined will be found elsewhere in the population. Each time one of those alleles is matched, the chances of finding another person with the same allele in the same locus decreases at a compound rate. So when, using Mr B's technique, a match of all 19 alleles and the sex indicator is found between the profile found on a cigarette butt at the scene and the defendant's known profile, Mr B is able to say that the chance of finding another match with a person in the UK population unrelated to the defendant is 1 in 1 billion. The population of the UK is about 60 millions. It is for you to decide whether in the circumstances of this case that effectively excludes anyone else but the defendant accepts that he was the donor of the saliva on the cigarette butts on his side of the bed.

The quality of the specimen may be such that only a few alleles are found in the scientific test. All 19 must have been there originally but they have not been revealed by the analysis. Obviously, the fewer the number of matches, the less discriminating is the statistical result. You will have noticed that when Mr B found only 2 alleles from a swab taken from one location on the baseball bat which matched the profile of the defendant, he did not put a statistical evaluation on it, because in his view his finding was statistically insignificant. What he meant was that you cannot rely on the match of only two alleles to make any identification of the donor because there are so many people in the UK population who would match it.

Origin, deposit and transfer of DNA material

The next thing we need to remember is that the DNA result does not necessarily, of itself, tell us from what cellular material the result was produced. It could have been blood, or in the case of a man, semen, or it could have been saliva, as in the case of the cigarette butts, or it could have been a slake of skin or sweat. When Mr B was describing saliva on the cigarette butts and semen on the vaginal swab he was only using common sense. That is what the material probably was given the place from which the specimen was taken. Secondly, as we have heard, there has to be enough good quality material to produce a full profile. Just because you have handled an object does not mean you left your DNA. You may do or you may not. If you do, you may not leave enough material to provide a full profile. You can pick up someone else's DNA and place it on another object which you handle. You can wipe blood with a cloth and the DNA may be transferred to the cloth. You may wipe the cloth on another surface and transfer DNA from the cloth in the process. If your hand has someone's blood on it you can transfer it to another object. Mr B told us how he took swabs from the baseball bat and the purse. Sometimes it was obvious to Mr B from his experience of examining such material that it was blood. On other occasions it seems to have been a mixture of blood and something else. Interpretation is a matter of deduction and judgement by an expert, whose evidence you have to consider, so we have to take care to understand exactly what Mr B was saying.

Mixed and partial profile from purse

Recovered from inside the bedside cabinet on Ms A's side of the bed was her purse. It was empty. Mr B found tiny smears of blood staining on the outer and inner surfaces of the wallet. He prepared the photographs at pages 5 and 6. He has marked the areas where he saw what appeared to be smears of blood and numbered them. On page 5 he has marked on the inside surface of the purse, area 1. From area 1 he obtained a swab which provided him with a DNA profile which appeared to be a mixture of two people. He could tell that two or more people had contributed because he found more than two alleles in the same locus in the profile. The major component of the mixed profile came from a woman. The minor component was provided by a man or more than one man. He obtained a full profile for the woman. It matched Ms A's profile. Mr B told you that the minor profile was incomplete. It comprised four distinct alleles, one in each of four separate loci. Mr B told you that, assuming these four alleles came from one person, the match probability that the DNA belonged to someone unrelated to the defendant was 1 in 120. In other words, for every 120 men in the male population, unrelated to the defendant, one could have been the source of the DNA. There are, therefore, on Mr B's assumption about 250,000 men in the UK who could have left their cellular material inside Ms A's purse.

Mr B was cross examined. He agreed that he had been provided with the DNA profiles of the men known to have had a relationship with Ms A within the preceding 3 years. One of those men, Mr C, had had a relationship with Ms A which lasted for some 3 weeks about 2 years before Ms A died. Of the four components in the mixed profile inside the purse which did not come from Ms A, two of them matched Mr C and the other two did not. If, contrary to Mr B's assumption, we assume that the minor component was contributed by two men, one of whom was Mr C, the match probability that the other two came from someone unrelated to the defendant was 1 in 9. That would mean that about 10 per cent of the male population of the UK or about 3 million men could have left the profile.

Mr C gave evidence. He told you that as far as he can recall he had never handled Ms A's purse and had certainly never opened it. Depending upon your view, the evidence of Ms A's sister, Ms E, may be more significant. She told you that she purchased the purse for Ms A for her last birthday on 28 March last year, at least a year after her relationship with Mr C was over. She was not challenged about the accuracy of her recollection.

It follows that your judgement of the significance of the DNA evidence concerning the purse may be different depending upon your decision whether you can exclude the possibility so you are sure that Mr C at some stage handled Ms A's purse.

Partial profile from baseball bat

I shall turn next to the handle of the baseball bat. Mr B swabbed the handle in an area where he would have expected the bat to be gripped but which appeared to be uncontaminated with blood. He obtained from the resulting swab an incomplete profile. He found six alleles which matched the corresponding alleles in the defendant's profile. Assuming that they came from one person the match probability of that person being unrelated to the defendant was 1 in 2,500. There are, on Mr B's assumption, about 12,000 men in the UK who could have left this material on the baseball bat.

Again Mr B was cross examined. He had compared the profile he obtained from the handle of the baseball bat with the profile of a man, Mr D, who had lived as a lodger in her flat for 6 months until New Year's Day, some four and half months before Ms A's death. Three of the alleles found by Mr B in the specimen from the handle matched Mr D's profile. If we assume that it was Mr D whose cellular material produced those three alleles, then the match probability of the other three being left by someone unrelated to the defendant rises to 1 in 77. That would mean that some 400,000 men could have deposited the other three alleles.

Mr D also gave evidence. During the time that he lived at Ms A's flat he had purchased the baseball bat. There had been a spate of burglaries locally and he purchased the bat for Ms A's protection. It was kept by Ms A in the corner of her bedroom and, to his knowledge, he had not touched it since it was put there in about October. When he left the flat in January the bat remained where it was. It is an agreed fact that at the time of Ms A's death Mr D was on honeymoon with his wife in France. You may conclude that although no other alleles were revealed in the analysis which would be consistent with Mr D being the donor, there is every reason to think he might have done. You should therefore assume that the other three alleles could have been deposited by 400,000 men in the UK of whom the defendant was only one.

Evaluation of DNA evidence

Mr B was asked to evaluate the significance of his findings. He told you that the results were what he would expect to find if:

- (1) The defendant was present in Ms A's bedroom before her death smoking cigarettes.
- (2) The defendant had opened Ms A's purse.
- (3) The defendant had handled the baseball bat.

All of the DNA found on the purse could be accounted for by Ms A and the defendant. All of the DNA found on the baseball bat could be accounted for by the defendant. It was possible, however, that someone other than the defendant or someone related to him had handled both the purse and the baseball bat. The DNA evidence is incapable of establishing, by itself, that the defendant did handle Ms A's purse or that he handled the baseball bat. The defendant is just one of many thousands of men who could have left the cellular material which produced the profiles Mr B obtained.

Directions

The DNA evidence is not alone capable of proving the identity of the killer. All it can do, depending upon your judgement of the evidence of Mr C, Ms E and Mr D, is to narrow down somewhat the group of men who could have left cellular material on the purse and the baseball bat. Even if you were to be sure that Mr C and Mr D did not leave their DNA on those items, there remain many thousands of men in the UK, unrelated to the defendant, who could have done.

However, the DNA evidence does not stand alone. You have heard from Ms A's sister, Ms E, that she visited her sister at lunchtime on Saturday. They had a cup of coffee together. Miss A told her that she was due to pay a substantial bill for repairs to her car at her local garage. She had saved up £500 in cash. She took the money from a pot in the kitchen and placed it in her purse which she put on the kitchen table. It was still

there when the defendant called at the flat at about 4pm and Ms E left. That money was never paid to the garage and it was not in the purse when the purse was recovered from the bedside cabinet. At about 11pm on Saturday night the defendant went to a casino in Manchester city centre and remained there until 2 am. He exchanged £500 cash for chips which, during the course of the night, he lost. He left the casino when he was refused credit and the casino refused to cash his cheque. The defendant said in evidence that the £500 was accumulated winnings from previous visits to the casino.

I will remind you of this and the other evidence of the surrounding circumstances, together with the defendant's evidence, in more detail later. The prosecution invites you to infer that Ms A took her purse into the bedroom with her. While she was asleep the defendant took the opportunity to steal her money. When Ms A awoke to discover what was happening the defendant beat her with the baseball bat until she was dead. The defence case is that no such inference is available or, if it is, you could not be sure of it.

Sources

Archbold 14-58; Blackstone F18.32

CHAPTER 8: EXPERT EVIDENCE

Introduction²⁶⁸

Procedure

Criminal Procedure Rule 33 (re-cast in October 2009 by Criminal Procedure (Amendment) Rules 2009 SI 2009/2087) provides as follows:²⁶⁹

“33.1 Reference to expert

A reference to an ‘expert’ in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.

33.2 Expert’s duty to the court

- (1) An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.
- (3) This duty includes an obligation to inform all parties and the court if the expert’s opinion changes from that contained in a report served as evidence or given in a statement.

33.3 Content of expert’s report

- (1) An expert’s report must –
 - (a) give details of the expert’s qualifications, relevant experience and accreditation;
 - (b) give details of any literature or other information which the expert has relied on in making the report;
 - (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
 - (d) make clear which of the facts stated in the report are within the expert’s own knowledge;
 - (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and –
 - (i) give the qualifications, relevant experience and accreditation of that person,

Footnotes

²⁶⁸ See also [Expert Evidence Professor David Ormerod and Andrew Roberts \(December 2007\) and Update Professor Ormerod \(August 2008\) JSB website, Criminal/E-library/Evidence](#); The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales – A New Approach to the Determination of Evidentiary Reliability, Law Commission Consultation Paper 190

²⁶⁹ Note the application of the rule to expert DNA evidence, [Chapter 7 \(5\) Identification by DNA, ‘Procedural Requirements’](#) and observations of Thomas LJ in [Reed, Reed and Garmson \[2009\] EWCA Crim 2698](#) paras 128-134

- (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
 - (iii) summarise the findings on which the expert relies;
 - (f) where there is a range of opinion on the matters dealt with in the report –
 - (i) summarise the range of opinion, and
 - (ii) give reasons for his own opinion;
 - (g) if the expert is not able to give his opinion without qualification, state the qualification;
 - (h) contain a summary of the conclusions reached;
 - (i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and
 - (j) contain the same declaration of truth as a witness statement.
- (2) Only sub-paragraphs (i) and (j) of rule 33.3(1) apply to a summary by an expert of his conclusions served in advance of that expert's report.

33.4 Service of expert evidence

- (1) A party who wants to introduce expert evidence must –
- (a) serve it on –
 - (i) the court officer, and
 - (ii) each other party;
 - (b) serve it –
 - (i) as soon as practicable,²⁷⁰ and in any event
 - (ii) with any application in support of which that party relies on that evidence; and
 - (c) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect
 - (i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and
 - (ii) anything on which any such examination, measurement, test or experiment was carried out.
- (2) A party may not introduce expert evidence if that party has not complied with this rule, unless –
- (a) every other party agrees; or
 - (b) the court gives permission.

Footnotes

²⁷⁰ The defence was not permitted to rely upon a psychiatric report for the purposes of section 35 Criminal Justice and Public Order Act 1994 with which the prosecution was, contrary to former Rule 24, "ambushed" after a decision had been made that defendant would not give evidence: *Ensor* [2009] EWCA Crim 2519

33.5 Expert to be informed of service of report

A party who serves on another party or on the court a report by an expert must, at once, inform that expert of that fact.

33.6 Pre-hearing discussion of expert evidence

- (1) This rule applies where more than one party wants to introduce expert evidence.
- (2) The court may direct the experts to –
 - (a) discuss the expert issues in the proceedings; and
 - (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.
- (3) Except for that statement, the content of that discussion must not be referred to without the court's permission.
- (4) A party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under this rule.

33.7 Court's power to direct that evidence is to be given by a single joint expert

- (1) Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.
- (2) Where the co-defendants cannot agree who should be the expert, the court may –
 - (a) select the expert from a list prepared or identified by them; or
 - (b) direct that the expert be selected in another way.

33.8 Instructions to a single joint expert

- (1) Where the court gives a direction under rule 33.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.
- (2) When a co-defendant gives instructions to the expert he must, at the same time, send a copy of the instructions to the other co-defendant(s).
- (3) The court may give directions about –
 - (a) the payment of the expert's fees and expenses; and
 - (b) any examination, measurement, test or experiment which the expert wishes to carry out.
- (4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.
- (5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

33.9 Court's power to vary requirements under this Part

- (1) The court may –
 - (a) extend (even after it has expired) a time limit under this Part;
 - (b) allow the introduction of expert evidence which omits a detail required by this Part.
- (2) A party who wants an extension of time must –
 - (a) apply when serving the expert evidence for which it is required; and
 - (b) explain the delay.”

Hearsay

By section 30 Criminal Justice Act 1988 the court may, subject to fairness, admit in evidence an expert's report without the attendance of the maker. Section 30 provides:

- “(1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.
- (2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.
- (3) For the purpose of determining whether to give leave the court shall have regard—
- (a) to the contents of the report;
 - (b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
 - (c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
 - (d) to any other circumstances that appear to the court to be relevant.
- (4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.
- (4A) Where the proceedings mentioned in subsection (1) above are proceedings before a magistrates' court inquiring into an offence as examining justices this section shall have effect with the omission of—
- (a) in subsection (1) the words “whether or not the person making it attends to give oral evidence in those proceedings”, and
 - (b) subsections (2) to (4).]
- (5) In this section “expert report” means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.”

The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by section 127 Criminal Justice Act 2003 which provides:

“Expert evidence: preparatory work

127. (1) This section applies if—

- (a) a statement has been prepared for the purposes of criminal proceedings,
- (b) the person who prepared the statement had or may reasonably be supposed to have had personal knowledge of the matters stated,
- (c) notice is given under the appropriate rules that another person (the expert) will in evidence given in the proceedings orally or under section 9 of the Criminal Justice Act 1967 (c. 80) base an opinion or inference on the statement, and
- (d) the notice gives the name of the person who prepared the statement and the nature of the matters stated.

(2) In evidence given in the proceedings the expert may base an opinion or inference on the statement.

(3) If evidence based on the statement is given under subsection (2) the statement is to be treated as evidence of what it states.

(4) This section does not apply if the court, on an application by a party to the proceedings, orders that it is not in the interests of justice that it should apply.

(5) The matters to be considered by the court in deciding whether to make an order under subsection (4) include—

- (a) the expense of calling as a witness the person who prepared the statement;
- (b) whether relevant evidence could be given by that person which could not be given by the expert;
- (c) whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them.

(6) Subsections (1) to (5) apply to a statement prepared for the purposes of a criminal investigation as they apply to a statement prepared for the purposes of criminal proceedings, and in such a case references to the proceedings are to criminal proceedings arising from the investigation.

(7) The appropriate rules are rules made—

- (a) under section 81 of the Police and Criminal Evidence Act 1984 (advance notice of expert evidence in Crown Court), or
- (b) under section 144 of the Magistrates’ Courts Act 1980 (c. 43) by virtue of section 20(3) of the Criminal Procedure and Investigations Act 1996 (c. 25) (advance notice of expert evidence in magistrates’ courts). “²⁷¹

By section 118 Criminal Justice Act 2003 the common law rule enabling an expert to “draw on the body of expertise relevant to his field” is preserved.²⁷²

Footnotes

²⁷¹ Note also the possible application of section 17 Criminal Justice Act 2003 (business documents) and section 30 Criminal Justice Act 1988 (admissibility with leave of a written expert’s report)

²⁷² Note also the possible application of section 117 Criminal Justice Act 2003 (business documents)

Directions

The purpose of expert evidence of fact (e.g. observation, test, calculation) and opinion is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert has expressed an opinion remains one for the jury and not for the expert. The jury should be informed that they are not bound by expert opinion, particularly when the expert has expressed an opinion on the ultimate issue in the trial.²⁷³ It would be a misdirection to assert that an expert's opinion given on behalf of the prosecution should be accepted if it is uncontradicted.²⁷⁴ However, when there is no evidence capable of undermining unchallenged expert opinion that fact may be and, when the evidence is favourable to the defence case, should be emphasised. It may be important to distinguish between expert examination of physical objects under laboratory conditions and the conclusion drawn by the expert from the results. The jury should be discouraged from attempting to act as their own experts, e.g. in handwriting and fingerprint cases.²⁷⁵

For the limitations of expert evidence at the boundaries of medical knowledge see *Cannings*²⁷⁶ and *Kai-Whitewind*²⁷⁷ and, when medical understanding is incomplete, *Holdsworth*²⁷⁸ and *Harris and others*²⁷⁹. It is common for experts from different areas of expertise to give evidence concerning the same or linked issues. For example, a consultant pathologist, neurosurgeon and an orthopaedic surgeon may all give evidence as to the cause of a death or serious injuries. The trial judge will need to be watchful for experts straying outside their areas of expertise and to explain to the jury its possible effect upon their assessment of the evidence.

Forensic scientists have access to information about the frequency with which their findings might be replicated in the UK at large (e.g. the refractive index of glass, a manufacture and model of footwear, DNA profiles). Whenever statistical evidence is produced to support expert conclusion it will be necessary closely to examine any data produced upon which the evidence is based and to ensure that the conclusion is supported by the data and explained to the jury, with a health warning if necessary.

Marshalling disputed expert evidence in a form calculated to provide the jury with a comprehensible summary of the issues for their decision is an important and often difficult task which will require careful preparation. The following illustrations do not purport to deal with any particular area of expertise which will almost certainly require individual treatment.

Footnotes

²⁷³ *Stockwell* [1993] 97 Cr App R 260, per Lord Taylor CJ at page 266

²⁷⁴ *Davie v. Magistrates of Edinburgh* [1953] SC 34 at page 40

²⁷⁵ *Anderson* [1972] 100 (PC) in which the trial judge wrongly implied that the jury could substitute for the expert's finding that there was no blood to be seen on the defendant's boots, their own contrary conclusion. The jury could not supplant the expert's physical finding with the result of their own inexpert examination; *Sanders* [1991] 93 Cr App R 245; *Lanfear* [1968] 2 QB 77, 52 Cr App R 176

²⁷⁶ [2004] 2 Cr App R 7, [2004] EWCA Crim 1

²⁷⁷ [2005] 2 Cr App R 31, [2005] EWCA Crim 1092

²⁷⁸ [2008] EWCA Crim 971

²⁷⁹ [2006] 1 Cr App R 5, [2005] EWCA Crim 1980

Illustration – Experts on both sides – purpose of expert evidence - distinguishing fact and opinion – decision for jury – weight for jury

Both the prosecution and the defence have relied upon the evidence of expert witnesses in the following categories.....This kind of evidence is given to help you with scientific or technical matters about which the witnesses are expert and we are not. As you have heard, experts carry out examinations and some conduct tests to see whether they yield results which are relevant to the issues you have to consider. They are permitted to interpret those results for our benefit, and to express opinions about them, because they are used to doing that within their particular area of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. Remember that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decisions.

Where, as here, there is no dispute about the findings made by an expert you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason in the evidence to reject them. On the other hand, opinions as to the significance of those findings are certainly in dispute and judging these competing views is a matter for you. Experts are not here to argue the case for one side or the other but to assist you to understand how they have reached the opinions they have expressed. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinions.

If, after giving careful consideration to the evidence of an expert, you do not accept his opinion, then you should not act upon it. The weight you attach to any conclusion you do accept is for you to determine.

Illustration – Warning against self-expertise – experts giving evidence

In judging the evidence of the experts the advocates have invited you to reach conclusions from your own examination of the exhibits. That is a perfectly legitimate request to make. After all, how can you form a view about the accuracy of the experts' conclusions without following what they have demonstrated to you? That does not mean, however, that you should be tempted to draw conclusions without reference to the evidence which the experts have given. We do not have the skills required to carry out an expert examination of the exhibits without the assistance of the experts. Your task is to reach a conclusion based upon an assessment what evidence or parts of the evidence from the experts you accept, not to reach an independent judgment of your own.

Illustration – Warning against self-expertise – no experts giving evidence

An issue has arisen whether.....[e.g. handwriting, voice identification]. Neither side has called expert evidence to assist you. This is an area in which you should not attempt to reach any conclusion based upon an inexperienced comparison of your own. In deciding whether the prosecution has proved that....was the author of....you should concentrate only upon the evidence of...

Sources

Archbold 10-61/70b; Blackstone F10.1/29

CHAPTER 9: CORROBORATION AND THE SPECIAL NEED FOR CAUTION

Introduction

1. Corroboration is relevant, admissible²⁸⁰ and credible²⁸¹ evidence which is independent of the source requiring corroboration²⁸², and which implicates the accused.
2. The former rule requiring a direction that the jury should look for corroboration of the evidence of an accomplice and of a complainant in the trial of a sexual offence was abolished by section 32 Criminal Justice and Public Order Act 1994. The former rules requiring corroboration of the evidence of a child, sworn or unsworn, were abolished by the Criminal Justice Act 1991, section 101(2) and the Criminal Justice Act 1988, section 34(2).
3. Corroboration is required by statute only in cases of treason²⁸³, perjury²⁸⁴ and attempts to commit such offences²⁸⁵.
4. While corroboration in the strict sense is not required to support the evidence of accomplices or others the circumstances may nevertheless require the judge to give a warning to the jury about the need for caution in the absence of supporting evidence. Guidance was given by Lord Taylor CJ in *Makanjuola*²⁸⁶:

“Given that the requirement of a corroboration direction is abrogated in the terms of section 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing-up to a jury urge caution in regard to a particular witness and the terms in which that should be done.

The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving “discretionary” warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account

Footnotes

²⁸⁰ *Scarrott* [1978] QB 1016 at page 1021

²⁸¹ *DPP v. Kilbourne* [1973] AC 729 at page 746; *DPP v. Hester* [1973] AC 296 at page 315

²⁸² *Whitehead* [1929] 1 KB 99

²⁸³ Treason Act 1795, section 1

²⁸⁴ Perjury Act 1911, section 13

²⁸⁵ Criminal Attempts Act 1981, section 2(2)(g)

²⁸⁶ [1995] 1 WLR 1348, [1995] 2 Cr App R 469 at page 472

in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

To summarise:

(1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.

(2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. **This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.**

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) **Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.**

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7)

(8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense." [bold emphasis added]

5. Where the jury is advised to look for supporting evidence, the evidence which is capable of supporting the witness should be identified.²⁸⁷
6. The need to consider a *Makanjuola* direction applies whenever the need for special caution is apparent. An accused may have a purpose of his own to serve by giving evidence which implicates a co-accused.²⁸⁸ In *Jones*²⁸⁹, in which each of the defendants in part placed blame on the other, Auld LJ commended the

Footnotes

²⁸⁷ *B* [2000] Crim LR 181

²⁸⁸ *Cheema* [1994] 1 WLR 147, [1994] 98 Cr App R 195; *Muncaster* [1999] Crim LR 409; *Jones* [2004] 1 Cr App R 60, [2003] EWCA Crim 1966

²⁸⁹ At paragraph 47

suggestion from counsel that in such cases the jury should be directed (1) to consider the cases of each defendant separately, (2) the evidence of each defendant was relevant to the case of the other, (3) when considering the co-defendant's evidence the jury should bear in mind that the witness may have an interest to serve, and (4) the evidence of a co-defendant should otherwise be assessed in the same way as the evidence of any other witness.

7. The need for particular caution may arise when a witness' evidence could be tainted by improper motive.²⁹⁰
8. In *Stone*²⁹¹ the Court of Appeal re-iterated the need to examine the particular circumstances of the case before reaching a judgment in what terms the requirement for caution should be expressed.
9. Cases of unexplained infant death may give rise to serious and respectable disagreement between experts as to the conclusions which can be drawn from post mortem findings. Supporting evidence, independent of expert opinion, may be required.²⁹²

Directions

- The trial judge should discuss with the advocates the need for and the terms of any cautionary direction it is proposed might be given.
- The direction will be tailored to point out to the jury the particular risk of which they need to be aware before relying upon the evidence from the 'tainted' source.
- A particular sensitivity arises when defendants jointly charged give evidence implicating each other. There is a risk that a direction to exercise caution before acting on the evidence of either defendant will have the effect of diminishing the evidence of both defendants in the eyes of the jury.²⁹³ Judges are expected to give at least the "customary clear warning" to examine the evidence of each with care because each has or may have an interest of his own to serve.²⁹⁴
- It may be implicit that if D1's defence is true D2 must be guilty. In order to acquit D1 the jury need only consider that D1's evidence may be true. Since, however, the prosecution must prove its case against D2 so that the jury is sure, it does not follow that an acquittal of D1 must lead to the conviction of D2. That fact may need emphasising.

Footnotes

²⁹⁰ *Beck* [1982] 1 WLR 461, [1982] 74 Cr App R 221 at page 228 (defence making allegations of impropriety against witnesses for the prosecution); *Chan Wai-Keung* [1995] 1 WLR 251 (PC); [1995] 2 Cr App R 194 (prisoner awaiting sentence giving evidence in unrelated case); *Ashgar* [1995] 1 Cr App R 223 (defence allegation that prosecution witnesses were protecting one of their number); *Pringle* [2003] UKPC 9 and *Benedetto* [2003] 1 WLR 1545, [2003] 2 Cr App R 390 (cell confession); *Spencer* [1987] AC 128 (patients in a secure hospital)

²⁹¹ [2005] EWCA Crim 105

²⁹² *Cannings* [2004] 1 WLR 2607, [2004] EWCA Crim 1; c.f. *Kai-Whitewind* [2005] 2 Cr App R 457, [2005] EWCA Crim 1092 (in which evidence supporting the experts' opinion as to cause of death was found in post mortem results)

²⁹³ *Petkar and Farquhar* [2003] EWCA Crim 2668 at §75

²⁹⁴ *Knowlden and Knowlden* [1983] 77 Cr App R 94; *Cheema* [1994] 98 Cr App R 195

- Alternatively, D1's denial of participation may not of itself imply the guilt of D2. D1's accusation against D2 may stand free from the denial and entirely unsupported by any other evidence. If so, the need for caution when considering the accusation against D2, now also relied on by the prosecution, might be expressed in more trenchant terms.

Illustration – perjury – corroboration required

The prosecution case is that the defendant gave false evidence of alibi at his trial for robbery. In support of that alibi the defendant called his girlfriend, A, to support his account that, at the time of the robbery in Manchester, they were travelling in Scotland. A has now given evidence that the alibi was false. She has told you that on the day of the robbery she and the defendant were in Manchester until the late evening. The defendant left their flat in the morning. He returned in his car at about 4 pm. He told her they were going to Scotland for a few days holiday. During the journey to Scotland he told her he had committed the robbery. Later, she agreed to give false evidence at his trial.

Following the defendant's acquittal for the offence of robbery, the police discovered that the defendant had been issued with a summons for a speeding offence. That summons arose from a picture taken by a speed camera not far from the scene of the robbery, within minutes after the robbery had taken place. Further inquiries revealed that an hour before the robbery the defendant and his car were captured by CCTV footage on a garage forecourt close to the scene of the robbery.

In order to prove perjury it is not necessary for the prosecution to establish that the defendant was one of the robbers. The prosecution must prove that (1) the evidence of alibi given by the defendant at his trial for robbery was false and (2) the defendant gave that evidence deliberately, knowing it was false, or not believing it to be true.

The defendant has chosen not to give evidence before you, but it has been suggested to A on his behalf that she is lying.

You must first decide whether the prosecution has proved so that you are sure that the defendant was in Manchester, and not Scotland, at the time of the robbery. In considering that question you must not act on A's evidence alone. The statute creating the offence provides that the evidence of a single witness is insufficient to prove that a statement made on oath by the defendant was false. There must be evidence independent of A which supports her evidence that the defendant was in Manchester and not in Scotland. The speed camera and CCTV evidence is capable of providing that support provided you are sure that the devices did indeed capture events which occurred at the times and on the date recorded by them. I shall remind you of the evidence concerning those devices in a moment. The defendant has not sought to challenge that the man with the car in the CCTV footage is himself. It is for you to decide whether and to what extent this material does in fact support A's evidence.

If you are sure that the evidence given by the defendant at his trial for robbery was false since, as a matter of fact, he was in Manchester and not Scotland at the time of the robbery, then you must next consider the second question which is whether, when he gave that evidence, the defendant deliberately stated what he knew to be false or did not believe to be true.

Illustration – importation of drugs - accomplice awaiting sentence gives evidence – witness with an interest to serve

A gave evidence for the prosecution. He has pleaded guilty to the offence of being concerned in the importation of controlled drugs and is awaiting sentence. Following his arrest and interview A made a written agreement²⁹⁵ under which he agreed to assist the prosecution to bring his co-accused to trial. That agreement has culminated in him giving evidence implicating the defendant in the importation. The agreement to which I have referred is sanctioned by an Act of Parliament which specifically empowers the court which passes sentence on A to give credit for his assistance by passing a sentence of reduced length. The sentencing court will decide whether and, if so, to what extent A's sentence should be reduced in return for his assistance in bringing others to justice. It follows that A has a powerful incentive to give evidence in this case. This is a feature of A's circumstances which is plainly relevant to your consideration of his evidence.

The defence case is that A has lied to improve his own position. He has a motive to implicate the defendant and he has done it without regard to the truth. On the other hand, the prosecution has submitted that A has a compelling incentive to tell the truth. If he fails to tell the whole truth, he is likely to be exposed and he will not obtain the fruits of his co-operation.

Whenever a witness has an advantage to gain by giving evidence it is necessary to examine his evidence with particular care. The issue here is whether A's evidence is tainted by a desire to save his own skin, irrespective of the truth of what he says, or he is motivated by a desire to make full disclosure of his wrongdoing in return for a more lenient sentence. Ultimately, the question for you to resolve is whether you are sure A has told you the truth about the involvement of the defendant. You may not find it possible to reach a concluded view upon exactly what motivated A to co-operate as he did and you do not have to, provided that you bear well in mind the risk that his evidence presents.

A witness with a purpose of his own to serve may tell lies or he may tell the truth. In deciding whether A has told the truth you should consider not only what he said but the other evidence in the case. Where you find support for A's evidence from other sources you may be the more disposed to accept what he said. The prosecution asserts that there is other evidence which implicates the defendant and, therefore, supports what A told you about the defendant's complicity. It comprises covert surveillance of meetings between A and the defendant, telephone traffic between them at significant times and several answers given by the defendant in interview under caution which, he now acknowledges, were untrue.

I will summarise the evidence for you in a moment. It is capable of supporting A's evidence but it is for you to decide whether and to what extent you derive assistance from it. If it does support A's evidence then you may judge A's evidence in the light of that support. You are entitled to act on A's evidence whether it is independently supported or not, provided that you have regard to the need for caution.

Footnotes

²⁹⁵ Section 73 Serious Organised Crime and Police Act 2005

Illustration – cutthroat defence – each defendant with an interest to serve in blaming the other
D1 and D2 have given evidence in their own defence. Each of them has given evidence which is
unhelpful to the case of the other. D1 said.....D2 said....

The evidence of a defendant is evidence in the case. I have explained that you should examine the case of each defendant separately and in turn. When you are considering the case of D1, the evidence of D2 will be relevant. When you are considering the case of D2, the evidence of D1 will be relevant. You must assess the truth of each defendant's evidence as you would the evidence of any other witness but, when you do that, bear in mind that each of them has his own interest to consider when giving evidence in his own defence. Only if you are sure of guilt should you convict the defendant whose case you are considering.

Sources

Archbold 4-404a/405; Blackstone F5.1/15

CHAPTER 10: GOOD CHARACTER OF THE DEFENDANT

Introduction

1. A person is almost always to be treated as having a good character if he or she has no previous convictions. It is the duty of the trial judge to inform the jury of the relevance of the defendant's good character to the issues they are trying.²⁹⁶ It is a matter which should be discussed with the advocates before speeches, particularly when the judge has in mind a qualified direction.
2. Good character is relevant to credibility as well as to propensity. Credibility is in issue both when the defendant has given evidence and when, although he has not given evidence, he relies upon an account given in interview. Propensity is in issue whether or not the defendant has given evidence or an account in interview.
3. In *Moustakim*²⁹⁷, the Court of Appeal allowed an appeal on the sole ground that the trial judge's direction upon the defendant's good character was insufficiently emphatic. The Court observed, following *Vye*²⁹⁸ and *Lloyd*²⁹⁹, that:
 - "1. There is no explicit positive direction that the jury should take the appellant's good character into account in her favour.
 2. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
 3. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word "perhaps" is a significant dilution of the required direction.
 4. In the judge's direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself."
5. However, the terms in which the jury are directed will depend upon developments in the evidence in the particular case. In *Vye*³⁰⁰ Lord Taylor CJ said:

Footnotes

²⁹⁶ *Vye* [1993] 1 WLR 471, [1993] 97 Cr App R 134, approved by the House of Lords in *Aziz* [1996] 1 AC 41, [1995] 2 Cr App R 478

²⁹⁷ [2008] EWCA Crim 3096

²⁹⁸ (*Supra*)

²⁹⁹ [2000] 2 Cr App R 355

³⁰⁰ [1993] 97 Cr App R at page 139

“Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish to indicate, as is commonly done, that good character cannot amount to a defence.... Provided that the judge indicates to the jury the two respects in which good character may be relevant, i.e. credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based upon the facts of the individual case.”

6. The circumstances in which additional remarks will be appropriate will vary. The court in *Vye* had in mind two particular examples of cases where emphasis or qualification may be appropriate. First, where a long serving employee is charged for the first time with theft from his employer, the propensity limb may require emphasis. Secondly, the good character of a defendant who admits manslaughter may have limited relevance to the issue whether he is guilty of murder although, even in such a case, propensity may be relevant to the issue of intent.
7. Qualifying remarks will be appropriate where the evidence reveals that while the defendant has no previous convictions there is indisputable evidence of criminal conduct by him. In *Aziz*³⁰¹ Lord Steyn said:

“Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with *Vye* and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with *Vye*, the judge may in his discretion dispense with them. Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions.”

Directions

For the requirements of the standard good character direction see *Moustakim* above. The application of the principles is not always straightforward in practice. The exercise of judgement as to the terms in which the good character direction will be framed usually arises where the defendant argues that he should be *treated* as being of good character notwithstanding the presence of (usually minor and/or spent) convictions or where a defendant with previous convictions seeks a favourable direction as to propensity. This problem arose in *Gray*³⁰². The trial judge had declined to give the propensity limb of the good character direction in a trial for murder where the defendant had himself introduced his convictions for driving with excess alcohol and linked driving offences. The Court held that the direction should have been given. Rix LJ carried out an examination of the authorities and concluded with some helpful guidance:

“57. In our judgment the authorities discussed above entitle us to state the following principles as applicable in this context:

- (1) The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified (*Vye*, *Aziz*).

Footnotes

³⁰¹ [1995] 2 Cr App R at pages 483 and 488-489

³⁰² [2004] 2 Cr App R 498, [2004] EWCA Crim 1074

- (2) If a defendant has a previous conviction which, either because of its age or its nature, may entitle him to be treated as of effective good character, the trial judge has a discretion so to treat him, and if he does so the defendant is entitled to a *Vye* direction (*passim*); but
- (3) Where the previous conviction can only be regarded as irrelevant or of no significance in relation to the offence charged, that discretion ought to be exercised in favour of treating the defendant as of good character (*H*³⁰³, *Durbin*³⁰⁴, and, to the extent that it cited *H* with apparent approval, *Aziz*.) In such a case the defendant is again entitled to a *Vye* direction. It would seem to be consistent with principle (4) below that, where there is room for uncertainty as to how a defendant of effective good character should be treated, a judge would be entitled to give an appropriately modified *Vye* direction.
- (4) Where a defendant of previous good character, whether absolute or, we would suggest, effective, has been shown at trial, whether by admission or otherwise, to be guilty of criminal conduct, the prima facie rule of practice is to deal with this by qualifying a *Vye* direction rather than by withholding it (*Vye*, *Durbin*, *Aziz*); but
- (5) In such a case, there remains a narrowly circumscribed residual discretion to withhold a good character direction in whole, or presumably in part, where it would make no sense, or would be meaningless or absurd or an insult to common sense, to do otherwise (*Zoppola-Barrazza*³⁰⁵ and dicta in *Durbin* and *Aziz*).
- (6) Approved examples of the exercise of such a residual discretion are not common. *Zoppola-Barrazza* is one. *Shaw*³⁰⁶ is another. Lord Steyn in *Aziz* appears to have considered that a person of previous good character who is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged would forfeit his right to any direction (at 53B). On the other hand Lord Taylor's manslaughter/murder example in *Vye* (which was cited again in *Durbin*) shows that even in the context of serious crime it may be crucial that a critical intent separates the admitted criminality from that charged.
- (7) A direction should never be misleading. Where therefore a defendant has withheld something of his record so that otherwise a trial judge is not in a position to refer to it, the defendant may forfeit the more ample, if qualified, direction which the judge might have been able to give (*Martin*³⁰⁷)."

The essence of the standard direction is that good character is relevant to credibility and propensity, and should be considered in those respects in favour of the defendant, but it is for the jury to assess what weight they give to it.³⁰⁸

Where the judge agrees to treat the defendant as of good character the full good character direction should be given.³⁰⁹

Footnotes

³⁰³ [1994] Crim LR 205

³⁰⁴ [1995] 2 Cr App R 84

³⁰⁵ [1994] Crim LR 833

³⁰⁶ [2001] 1 WLR 1519: Defendant admitted being a dealer in cocaine and setting out with an armed posse to exact retribution on V for selling the gang fake cocaine.

³⁰⁷ [2002] 2 Cr App R 42: Defendant charged with importing cocaine admitted being a gold smuggler.

³⁰⁸ *Miah* [1997] 2 Cr App R 12; *Lloyd* [2000] 2 Cr App R 355; *Scranage* [2001] EWCA Crim 1171

³⁰⁹ *M (CP) (Practice Note)* [2009] 2 Cr App R 54 (3)

In a joint trial, where one defendant is of good character and the other not, a defendant of good character is entitled to the full standard direction.³¹⁰

If a defendant of good character has been interviewed but elects not to give evidence, the good character direction should be given. There is no inconsistency between the good character direction, a lies direction and a direction under section 35 CJPOA 1994.³¹¹

Illustration – standard direction – relevance to defendant’s credibility and propensity – good character is a positive feature of the defendant’s case – weight is for the jury

You have heard that the defendant is a man in his middle years with no previous convictions. Good character is not a defence to the charges but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept what he told you. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him.

It has been submitted on behalf of the defendant that for the first time in his life he has been accused of a crime of dishonesty. He is not the sort of man who would be likely to cast his good character aside in this way. That is a matter to which you should pay particular attention.

However, the judgements what weight should be given to the defendant’s good character and the extent to which it assists on the facts of this particular case are for you to make. In making that assessment you are entitled to take account of everything you have heard about him.

Illustration – qualified direction – convictions for unlike offences – defendant relies on lack of propensity

The defendant has previous convictions for road traffic offences, including a conviction for driving with excess alcohol in his body. The defendant cannot therefore put himself forward to you as a man of good character. On the other hand, it is rightly pointed out that the defendant has never been convicted of an offence of violence. To that extent, it is submitted that the allegation now made against him is out of character.

Whether the defendant is the sort of man who would behave violently and in temper is relevant to your consideration of the case against him. The absence in the defendant’s record of any such behaviour is a feature of the defendant which you should consider in his favour. Secondly, you may conclude that when you consider his evidence you should treat him as man without a record for dishonesty and, on that account, more likely to be a truthful witness. However, the weight which you attach to the defendant’s character is a matter for your judgement and in assessing its significance you are entitled to take account of all the evidence you have heard about him. Good character cannot, of course, amount to a defence.

Footnotes

³¹⁰ *Vye* [1993] 1 WLR 471, [1993] 97 Cr App R 134; *Houlden* [1994] 99 Cr App R 244

³¹¹ *Napper* [1996] Crim LR 591 per Lord Taylor CJ

Illustration – good character – evidence emerging in the trial relevant to credibility and propensity – qualified direction

The defendant is a young man who has never been convicted of a criminal offence. Good character is not a defence to the charges but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His previous good character is a positive feature of the defendant which you should take into account when considering whether you accept what he told you. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him.

However, you are not expected to make a judgement about the defendant's previous good character in isolation from the evidence you have heard. The defendant admits that when he was interviewed under caution he told persistent lies about his whereabouts at the time of the incident. Not until the final interview did he admit his presence. Secondly, the defendant said in interview, and has repeated to you in evidence, that he was one of the group who chased V1 and V2 down the street shouting threats. What he denies is that when they caught up with V1 and V2 he took any part in the assault.

The decisions whether the defendant's previous good character assists you in the circumstances of the present case and, if so, what weight should be given to it are for you to make.

Sources

Archbold 4-406/409; Blackstone F13.1/14

CHAPTER 11: BAD CHARACTER OF DEFENDANT

Explanation of Contents

When summing up, the trial judge will inform the jury for what purpose(s) the bad character evidence may be used and will give directions as to the way in which the evidence should be approached. The evidence may have become, and frequently does become, relevant for reasons other than those contemplated by the 'gateway' of admission. A common occurrence is the admission of bad character evidence upon the application of the prosecution to establish a relevant propensity which, by reason of the nature of the convictions admitted, is bound to affect the jury's approach to the credibility and reliability of the defendant's evidence generally. Unless the evidence has also been admitted under section 101(1)(g) there is no 'gateway' through which the prosecution could have adduced evidence simply to undermine the defendant's creditworthiness but, once admitted through a gateway, the evidence may³¹² be considered for that purpose. Relevance is always a matter for the trial judge. This will be particularly so when, having different interests to serve, the parties agree to the admission of the evidence under section 101(1)(a). The purposes for which bad character evidence may, by the time of the summing up, have become relevant include:

- (1) Judging the credibility of the defendant's evidence and/or case;
- (2) Judging whether the defendant's attack on another person's character is 'worthy of belief';
- (3) Explaining the background;
- (4) Establishing a propensity or disposition to commit the offence charged;
- (5) Providing evidence of system;
- (6) Identifying the defendant's 'signature' on the offence charged;
- (7) Establishing the defendant's propensity to be untruthful;
- (8) Rebutting a defence put forward or implied by the defendant;
- (9) Undermining the accusatory account of a co-accused;
- (10) Correcting a false impression created by the defendant.

Accordingly, while this section is arranged, after the General Introduction and Directions Generally, under gateway headings, this is for convenience only and does not imply any intention to confine 'relevance' to the gateway of admission.

Footnotes

³¹² See discussion at Directions (i) Propensity to Commit Offences of the Kind Charged below

General Introduction

Definition of bad character

1. Bad character, for the purpose of section 101 Criminal Justice Act 2003, is evidence of 'misconduct' on other³¹³ occasions, other than that which 'has to do with the alleged facts of the offence with which the defendant is charged' (section 98(a)), or is evidence of misconduct in connection with the investigation or prosecution of that offence (section 98(b)). Misconduct is the commission of an offence or other reprehensible behaviour (section 112). The word 'reprehensible' connotes culpability or blameworthiness.³¹⁴
2. If the misconduct alleged 'has to do with the offence' it may still be admissible as evidence relevant to proof that the defendant committed the offence.³¹⁵ See below 'Distinguishing between evidence of misconduct on other occasions and evidence which 'has to do with' the offence charged'.

Procedural requirements

3. The party seeking to adduce evidence of a defendant's bad character must give notice under CPR 35.³¹⁶

The gateways to admissibility

4. Evidence of misconduct by the defendant may have been admitted in evidence for any of the reasons provided by section 101(1) Criminal Justice Act 2003: (a) by agreement, (b) by the defendant himself (c) as important explanatory evidence, (d) as relevant to an important matter in issue between prosecution and defence, (e) as evidence of substantial probative value in relation to an important matter in issue between defendants, (f) to correct a false impression given by the defendant, (g) because the defendant has made an attack on another's character.

Handling of bad character issues

5. The sequence to be followed is:
 - Judge decides admissibility
 - Judge decides whether the evidence should nevertheless be excluded under section 101(3) CJA 2003 (gateway (d) or (g)) or section 78 PACE 1984.³¹⁷
 - Judge gives reasons under section 110 CJA 2003
 - Judge, when appropriate, decides whether the case should be stopped because the evidence is contaminated under section 107 CJA 2003

Footnotes

³¹³ Not necessarily an earlier occasion – see A [2009] EWCA Crim 513, in which later bad character evidence established a disposition to commit sexual offences of a kind alleged to have been committed by him many years previously

³¹⁴ *Renda* [2005] EWCA Crim 2826

³¹⁵ For a discussion of the meaning of bad character and related issues see JSB Training Website Criminal eLibrary Professor David Ormerod "The Criminal Justice Act 2003: Evidence of Bad Character", August 2009, pages 30-49

³¹⁶ For a discussion of the requirements of notice, adequacy of notice and proof of the bad character relied on see Ormerod "The Criminal Justice Act 2003: Evidence of Bad Character", August 2009, pages 4-19

³¹⁷ Except that section 78 does not apply to a defendant's application under section 101(1)(e)

- Judge discusses with the advocates at the close of the evidence for what purposes the ‘bad character’ evidence may be considered by the jury³¹⁸
- Judge directs the jury in summing up upon the relevance and limitations of the evidence
- Jury decides on weight and value of the evidence in determining the issue of relevance and, depending upon the centrality of the issue, guilt

Purpose for which evidence may be used

6. Bad character evidence, once admitted, may be used by the jury for any purpose for which it is relevant.³¹⁹ When summing up, the trial judge’s task is to explain to the jury for what purpose(s) the evidence may (and, perhaps, may not) be used.³²⁰
7. Thus, the judge may be directing the jury that the bad character evidence is relevant, depending on their view, to any of the matters listed in the first page of this Chapter.
8. The purpose of the legislation is to ‘assist the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice’.³²¹

Footnotes

³¹⁸ Discussion is necessary even and perhaps particularly when the evidence was admitted by agreement. See *Marsh* [2009] EWCA Crim 2696 to avoid misunderstanding

³¹⁹ *Highton* [2005] 1 WLR 3472; [2005] EWCA Crim 1985; *Edwards* [2006] 1 WLR 1524; [2005] EWCA Crim 1813; *Campbell* [2007] 1 WLR 2798; [2007] EWCA Crim 1472

³²⁰ *Edwards* (*supra*) at §3; *Campbell* (*supra*) at §37-38

³²¹ *Hanson* [2005] 1 WLR 3169; [2005] EWCA Crim 824

Distinguishing between evidence of misconduct on other occasions and evidence which 'has to do with' the offence charged

1. The jury should be given appropriate legal directions as to the purpose for which the evidence may be used and those directions may need to include a warning as to its limitations. Accordingly, the judge will need to distinguish between:
 - (i) Evidence of misconduct which has to do with the offence charged (section 98(a) CJA 2003) and is admissible at common law because it is relevant; and
 - (ii) Evidence of misconduct which requires a gateway to admissibility (section 101(1) CJA 2003).
2. The distinction between the two classes of evidence continues to cause problems. In *Anderson*³²² the defendant was charged with conspiracy to supply the controlled class A drug cocaine. A substantial quantity of the drug was found in a flat used by him. The defendant denied knowledge of the drug although his fingerprint was found on a box in which part of the drug was stored. The prosecution sought to adduce evidence that in July, a month before his arrest, the defendant had been stopped in a car in which there was found a substantial quantity of Mannitol, a substance with perfectly legitimate uses but which could also be used, and was used by some dealers, for 'cutting' cocaine. It was not, however, the prosecution case that the Mannitol was or may have been intended for cutting the cocaine found in the defendant's flat. The Court of Appeal approved the admission of the evidence as tending to undermine the defence of innocent association with the boxes of the drug in the following terms (per Latham LJ):

"12.....the inference that the jury were being asked to draw was that he had Mannitol for a nefarious drug-related purpose in July. It was therefore evidence relating to misconduct within the meaning of section 98. As far as the gateway through which it could go before the jury was concerned it was quite clearly, in our judgment, relevant to an important matter in issue between the defendant and the prosecution within the meaning of section 101(1)(d)."
3. The "important matter in issue" was not propensity but knowledge of the contents of the boxes. Before the jury could use the Mannitol evidence for that purpose they would have to draw the inference that it was indeed intended for a 'nefarious drug-related purpose' and, therefore, that it was bad character evidence. The principle which emerges is that if the *purpose* of adducing the evidence is to demonstrate misconduct on another occasion a gateway must be opened. If the jury are invited to treat the evidence as evidence of misconduct on another occasion or there is a risk that they will do so a bad character direction will be required.
4. Before the 2003 Act, evidence of possession of large quantities of cash might be admitted in support of a prosecution case of possession of drugs with intent to supply if it was relevant to the issue of intent, but not admissible if it was evidence simply of past criminal conduct and, therefore, of propensity.³²³
5. In *Graham*³²⁴ the complaint was made on appeal, post-2003 Act, that the trial judge failed in his directions to the jury to illuminate the distinction between his possession of cash (1) as evidence of an historical criminal transaction and (2) as evidence that the appellant was a current drug dealer. Toulson LJ, while acknowledging that the Court had not received argument upon the impact of the 2003 Act, said:

Footnotes

³²² [2008] EWCA Crim 837

³²³ See e.g. *Morris* [1995] 2 Cr App R 69

³²⁴ [2007] EWCA Crim 1499

“25....Under the bad character provisions of that Act, conduct showing that a defendant had supplied drugs in the past would be admissible as going to show propensity. If the jury is satisfied that the true explanation for the presence of money on a defendant at the time of his arrest is that it represents the proceeds of drug dealing, the distinction between treating it (a) as evidence that he is a drug dealer, or (b) as evidence that he has dealt in drugs and has a propensity to do so, is fine. In many cases it would be a distinction without a practical difference. As at present advised, we think, generally speaking, that it would be needlessly complicating for a judge to have to explore such a distinction in giving directions to a jury. There would also be something highly artificial in the prosecution having to make an application under the Criminal Justice Act for the admission of such evidence as going to show propensity when the evidence is already admissible.”

This passage was subsequently cited by the Court of Appeal, refusing leave, in *Green and Others*³²⁵, although in that case leave was refused on the specific ground that the trial judge had admitted the evidence as relevant to the offences charged. She had directed the jury that the evidence of a ‘criminal lifestyle’ was only to be considered by them if (i) they rejected the defendant’s explanations and (ii) it could be accounted for only by his involvement in the conspiracies charged in the indictment (i.e. as under the pre-2003 Act rule, the evidence was directly relevant to the offence charged).

6. Toulson LJ’s observations in *Graham* seem to suggest that evidence that the defendant is a current drug dealer is admissible as evidence of misconduct which “has to do with the alleged facts of the offence with which the defendant is charged” under section 98(a) of the Act, rather than as evidence of misconduct on other occasions relevant to an important matter in issue between the defendant and the prosecution under section 101(1)(d). Evidence of possession of a substantial sum of cash may have to do with the facts of the offence charged if, for example, it represents the proceeds of a supply with which the defendant is charged, or it represents the defendant’s fund for a purchase relevant to a charge of conspiracy or being concerned. But, where the prosecution is not alleging that the possession of cash relates to the offence charged, or where the prosecution is not conceding that the source of the money is honest, its likely *purpose* is to demonstrate, by conduct on other occasions, that the defendant is a current drug dealer, which is simply more cogent evidence of propensity.
7. The importance to the trial judge of the distinction between evidence admitted under the common law as “having to do with” the offence charged and evidence of misconduct on other occasions is that (1) the latter requires a gateway for admission and (2) if the evidence is admitted, a bad character direction is required. In *Graham* the charge was possession with intent to supply. The defendant was found in possession of ecstasy, and secreted in his flat was £3,000 in cash. The prosecution case was that the cash represented the proceeds of current dealing. It is suggested that the evidence was clearly admissible under section 101(1)(d). There was indeed a fine distinction between the *conclusions* that the defendant was a current drug dealer, on the one hand, and that he had at some time in the past dealt in drugs, on the other. However, the qualification for admissibility was, in either event, a section 101(1) gateway. In some cases the distinction between the competing conclusions may be significant to the task the jury has to perform. Where, for example, there is an admission of past dealing but a denial of current dealing, a careful ‘bad character’ direction may be required.³²⁶

Footnotes

³²⁵ [2009] EWCA Crim 1688

³²⁶ See also Professor David Ormerod “The Criminal Justice Act 2003: Evidence of Bad Character” August 2009, JSB website (Criminal/ELibrary), paragraphs 5.29-5.44

Directions Generally

Whenever bad character has been admitted in evidence, including, and perhaps especially, where the evidence has been admitted by agreement, the judge should discuss with the advocates before speeches the purposes for which the jury may use the evidence. The question whether the jury may be directed that bad character evidence admitted through gateways (a), (b), (c), (d), and (f) can be considered when they are assessing the credibility of the defendant's evidence is discussed below.³²⁷

The bad character evidence may take the form of criminal convictions or evidence of behaviour which has not resulted in any criminal charge or conviction (even evidence which has previously led to an acquittal). The bad character evidence should be identified and, where it is disputed, the extent of the dispute summarised. It is not usually necessary to explain the technicalities of admission of the evidence, but it is necessary to explain for what purposes the evidence may be used in its appropriate factual context, and that it is not to be used as mere prejudice. It may be appropriate to warn the jury against using the evidence for an inappropriate purpose. For example, evidence admitted because the defendant has made an attack on another person's character may not be sufficient to establish a propensity to commit the crime charged. Where there is a risk that the jury might use the evidence inappropriately, they should be told both of the limited purpose for which the evidence can be used and directed that the evidence cannot otherwise support the prosecution case.

The jury should be directed that they should make the following decisions:

- Where the bad character is disputed, whether they are sure the bad character is proved and, if so, to what extent
- Whether and to what extent the bad character evidence has the effect for which the party relying on it contends (e.g. explaining the background, proving a propensity, undermining an attack on another person's character)
- When the evidence is capable of supporting the assertion of guilt, whether and to what extent the bad character evidence assists them to decide that issue

The jury should be reminded of the defence case upon each of these issues.

The jury should be assisted to place the bad character evidence within the perspective of the evidence as a whole. They should be reminded that bad character evidence is merely part of the evidence in the case and does not of itself prove guilt. To whichever issue the bad character evidence is relevant, the jury should be careful not to place so much emphasis on it that the defendant would be unfairly prejudiced.

A direction to treat the evidence of bad character proportionately may not, however, be appropriate where the prosecution's case depends exclusively, or almost exclusively, upon the similarity of other misconduct by the defendant to prove the current charge, or where the prosecution case is that he left his 'signature' on the offence charged.³²⁸

Footnotes

³²⁷ See (2) Section 101(1)(d) Evidence Relevant to an Important Matter in Issue Between the Prosecution and Defence Directions (i) Propensity to Commit Offences of the Kind Charged and (ii) Propensity for Untruthfulness below

³²⁸ See also Chapter 12 Cross Admissibility and Directions (iii) Defendant's Signature below. If the judge is giving a 'similar fact' direction in which the jury is invited to infer guilt from an alleged course of conduct, a full bad character direction may not be required and a modified direction warning against prejudice will suffice. Once, however, it becomes apparent that the jury may legitimately treat similar fact evidence which they have found proved as evidence of propensity to commit another offence with which the defendant is charged, the warning as to perspective and proportionality will be required.

(1) Section 101 (1) (c): Important Explanatory Evidence

Introduction

1. Before the Criminal Justice Act 2003 background evidence was admissible to assist the jury in making sense of the events they were considering. It was commonly admitted to demonstrate that acts of violence were committed against a history of animosity, jealousy or controlling conduct.³²⁹
2. Judges would exclude aspects of such evidence under section 78 Police and Criminal Evidence Act 1984 if its prejudicial effect outweighed its probative value.
3. In the days before evidence of propensity was admissible, the Court of Appeal had warned that judges should not admit propensity evidence in the guise of background evidence.³³⁰
4. Background evidence will continue to be admitted under section 101(1)(c) as 'important explanatory evidence'.³³¹ However, the ambit of section 101(1)(c) is not confined to the history of a relationship between the defendant and another. In *Chohan*³³² an identifying witness knew the defendant as a drug dealer. That fact supported the accuracy of her identification. The basis of her knowledge of the defendant was correctly admitted as 'important explanatory evidence'. It explained why the witness was able confidently to provide evidence of identity by recognition.³³³
5. It remains important, however, to ascertain whether the evidence admitted under gateway (c) is capable of being used by the jury for any other purpose. If, for example, the evidence is additionally relevant to some other matter in issue between the prosecution and the defence (e.g. propensity for violence towards the alleged victim) the jury will need an explanation. If it is not, it will be necessary to give a specific warning that in no other respect can the evidence assist the prosecution case.
6. In *Davis*³³⁴ the Court of Appeal again warned against admitting evidence as explanatory, with limited or no probative value as such, when the real purpose is to suggest propensity without qualifying through the section 101(1)(d) gateway.
7. A discussion with the advocates before speeches is required before the judge decides how the bad character evidence will be left to the jury.

Footnotes

³²⁹ *Pettman* 2 May 1985 unreported per Purchas LJ; "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then, the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not itself a ground for excluding the evidence.";

³³⁰ *Dolan* [2003] 1 Cr App R 281, [2003] EWCA Crim 1859 at §27

³³¹ See section 102, "Evidence is important explanatory evidence if (a) without it the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial."

³³² One of the conjoined appeals in *Edwards* [2006] 1 Cr App R 31; [2005] EWCA Crim 1815 §62-78

³³³ The evidence was probably admissible also under gateway (d), identification being an important matter in issue.

³³⁴ [2008] EWCA Crim 1156

Directions

Illustration – relationship between defendant and complainant – relevance of course of relationship to issues in the trial – background provides evidence of propensity – supporting evidence – warning of limits of background and propensity evidence

You have heard evidence of the history of the relationship between the defendant and Miss A. It is relevant because, if you accept it, it explains that the events of....did not take place in isolation. You are entitled to take the background of the relationship into account when deciding what happened on...There are two aspects of the background on which the prosecution places reliance. The first is Miss A's description of the defendant as being jealous and controlling throughout the 12 months which preceded the alleged attack. This is relevant to Miss A's assertion that it was in a fit of jealousy that the defendant attacked her on this occasion. The second is Miss A's description of two previous occasions, within a month before the present incident, on which the defendant suddenly used violence upon her. The prosecution case is that the previous violence is relevant because it establishes a tendency in the defendant to use unlawful violence upon Miss A when jealous, frustrated and angry. If so, that makes it more likely that the defendant was the aggressor on the present occasion and less likely that, as he asserts, he was acting in self defence.

You must decide whether you accept the evidence of Miss A about these earlier incidents. In making that decision you will need also to consider the evidence of her mother. Mrs A spoke about her knowledge of the relationship. She also told you that she saw injuries on her daughter during the days which followed the earlier incidents. The defendant's evidence about those incidents and the cause of the injuries was very different.

If you do accept Miss A's account, then it is your decision whether it demonstrates a tendency in the defendant to be violent towards her. If you are sure it does, you may have regard to that tendency when resolving the question whether the defendant was the aggressor on the present occasion. It is for you to decide whether and to what extent your finding helps you in this respect.

Please remember that the critical evidence concerns the events of....It is important to keep a sense of proportion about the evidence of past incidents. It may be helpful in resolving where the truth lies, that is for you to judge, but past incidents cannot alone prove the defendant's guilt. Even if you do accept that the defendant has behaved badly towards Miss A in the past it does not necessarily follow that he acted as alleged on the present occasion.

Illustration – alleged offence within the confines of a prison – explanatory background - sentence being served for unlike offences – antecedents not relevant to propensity – but may be relevant to credibility - warning of limitations as to use of evidence of previous convictions

The defendant is charged with assault occasioning actual bodily harm on a prison officer. The defendant was serving a sentence of 18 months imprisonment for offences of burglary. He volunteered in evidence that he has a previous conviction 4 years ago for a public order offence of using threatening words and behaviour, several previous convictions for theft from shops and two convictions for burglary.

You have heard that the defendant was in prison because you would not otherwise have been able to make sense of the evidence. You may wonder whether his previous convictions have any other relevance in the case.

They may, depending on your view, be relevant to the question whether you can accept that the defendant's evidence is true or may be true. Whether they do assist in that respect is for you to judge. A person with no criminal record may be more likely to tell the truth and a dishonest person may be more likely to tell lies, but remember that a witness with no criminal record may well tell lies, while a witness with a criminal record may well give honest evidence.

The defendant himself argues that since he has, during his 38 years, never been convicted of an offence of personal violence towards another, it is less likely that on this occasion he acted violently towards V. This is also a consideration to which you should have regard. The public order offence which the defendant admits took place a long time ago in very different circumstances and there is no evidence that it was aimed at any particular individual.

It is for you to resolve whether these convictions assist you to the extent I have indicated and, if so, how much weight you should attach to them.

There is, however, no other respect in which these convictions are relevant to your consideration of the case. In particular, they provide no evidence, of themselves, to support the prosecution case that the defendant was the aggressor. That question can only be decided by analysis of the evidence concerning the incident itself.

(2) Section 101(1)(d): Evidence Relevant to an Important Matter in Issue Between the Prosecution and the Defence

Introduction

1. By section 103(1) Criminal Justice Act 2003, ‘matters in issue between the defendant and the prosecution’ include *but are not limited to*:
 - “(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged (except where his having such a propensity makes it no more likely that he is guilty of the offence) and
 - (b) the question whether the defendant has a propensity to be untruthful (except where it is not suggested that the defendant’s case is untruthful in any respect)”.
2. Although ‘propensity’ is the most common matter in issue there are others which may be important but are not capable of establishing propensity. For example, evidence admitted through gateway (d) may be admissible to rebut a defence of innocent association.³³⁵ ‘Signature’ behaviour may be critical to proof of identity. ‘Similar fact’ evidence may provide evidence of propensity but the purpose of its introduction is not necessarily to prove the propensity but, directly, to prove guilt. Evidence of disposition may be admissible. It may or may not amount to bad character evidence. The judge should be careful to analyse the grounds for and purpose of admission of the evidence and direct the jury according to its present relevance.³³⁶
3. Evidence admitted through another gateway may also be relevant to propensity³³⁷ or another matter in issue. If it is, the jury will require directions to that effect and any limitations upon its use should be made clear.³³⁸
4. See “Distinguishing between evidence of misconduct on other occasions and evidence which ‘has to do with’ the offence charged” above.

Directions

(i) *Propensity to Commit Offences of the Kind Charged*

General guidance was given by the Vice-President, Rose LJ in Hanson³³⁹:

“Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed: that they should not conclude that

Footnotes

³³⁵ Colliard [2008] EWCA Crim 77

³³⁶ Fox [2009] EWCA 653

³³⁷ Highton [2005] 1 WLR 3472; [2005] EWCA Crim 1985; Lamaletie [2008] EWCA Crim 314

³³⁸ Lafayette [2008] EWCA Crim 3238

³³⁹ [2005] 1 WLR 3169; [2005] 2 Cr App R 21; [2005] EWCA 824 at §18

the defendant is guilty or untruthful merely because he has these convictions; that although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity is shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case. "

The Vice-President gave further assistance in *Edwards*³⁴⁰:

"The guidance proffered in paragraph 18 of *Hanson* as to what a summing-up should contain was, as is apparent from the last sentence of the paragraph, not intended to provide a blueprint, departure from which will result in the quashing of a conviction. What the summing-up must contain is a clear warning to the jury against placing undue reliance on previous convictions, which cannot, by themselves, prove guilt. It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision, bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in section 101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted. For example, some evidence admitted through gateway (g), because of an attack on another person's character, may be relevant or irrelevant to propensity, so as to require a direction on this aspect. Provided the judge gives such a clear warning, explanation and guidance as to use, the terms in which he or she does so can properly differ. There is no rigid formula to be adhered to."

In *Campbell*³⁴¹ the Court of Appeal (Lord Phillips CJ) advised that:

"Where evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case. Relevance can normally be deduced by the application of common sense. The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with this."

The 'credibility' issue

The Vice-President in *Edwards* and Lord Phillips CJ in *Campbell* gave approval to the form of direction given by HH Judge Mort in *Chohan*. Mr Chohan was charged with robbery of an elderly man while carrying a hand gun, and the unlawful possession of firearms. The issue in the robbery count was identification of the defendant. A witness, who saw the robber fleeing from the scene, claimed that Mr Chohan was her drugs supplier whom she knew well. She identified him. The judge admitted her evidence and evidence of the defendant's convictions for robbery, with the use of weapons, targeted against elderly victims. Judge Mort directed the jury that different features of the defendant's bad character were relevant to (1) explain the reliability of the identification evidence, (2) the defendant's propensity to commit the offence charged, and (3) the credibility of the defendant's evidence.³⁴²

Footnotes

³⁴⁰ [2005] 1 WLR 3472; [2006] 1 Cr App R 3; [2005] EWCA Crim 1813 at §3

³⁴¹ [2007] EWCA Crim 1472 at §24

³⁴² See Appendix 5(ii) for the trial judge's full direction on bad character

In *Campbell*³⁴³ Lord Phillips CJ reasoned³⁴⁴ that when directing the jury it would usually be unrealistic to make a distinction between a defendant's propensity to offend and his credibility as a witness because, faced with evidence of propensity to commit the offence, a jury would conclude, at one and the same time, that the defendant was more likely to be guilty and that he was, on that account, less likely to be telling the truth. In many cases that will be so, but the existence of a propensity does not of itself prove guilt (as the judge is required to direct the jury). The jury will need to assess the credibility of the defendant's present account. When they make that assessment they are entitled, it is suggested, to take account of the fact that the defendant has a bad character and the nature of that bad character, provided that they proceed with the necessary caution. To conclude otherwise would deprive section 101(1)(g) (bad character evidence admitted to assess whether an attack on another's character is worthy of belief) of meaning. The jury could reasonably form the view, for example, that a person who has been repeatedly dishonest in the past is less likely to be worthy of trust as a witness now even though dishonesty is not the same as untruthfulness; or that previous convictions for impulsive violence lend no assistance to that judgement.

Furthermore, in view of the approval by the Court of Appeal on two occasions of the credibility direction in *Chohan*, it is safe to advise that trial judges are at liberty to include the credibility of the defendant's evidence as an issue to which the bad character evidence may, depending upon the jury's view, be relevant. To what extent it may be of assistance will no doubt depend upon the particular circumstances of the case and the nature of the evidence of bad character.

The trial judge will need to ensure that any such direction meets the requirements of fairness and discourages prejudice. In *Chohan*, for example, Judge Mort pointed out that while the jury could take account of the defendant's convictions for dishonesty³⁴⁵ when they were assessing his evidence, that did not imply that the defendant was not or could not be telling the truth and, as the defendant had said, he had always previously pleaded guilty.

The following are the headlines for summing up to be extracted from the guidance provided by the Court of Appeal. The judge should:

- Discuss the issues with the advocates before speeches in order to establish with clarity the purpose for which the evidence may and may not be used
- Identify whether the evidence admitted is bad character within the meaning of sections 98 and 112. If it is admitted at common law (e.g. the evidence falls short of misconduct or a disposition to misconduct, but is nevertheless relevant to rebut a defence of innocent association or to prove disposition, or it has to do with the offence charged) it will still be necessary to explain the relevance of the evidence
- Identify for the jury the bad character evidence on which the prosecution relies
- Where the evidence and/or the conclusions to be drawn are disputed, summarise the defence case
- Identify by reference to the facts of the case the issue(s) to which the bad character evidence is relevant

Footnotes

³⁴³ [2007] EWCA Crim 1472

³⁴⁴ §28-30

³⁴⁵ It is suggested that Judge Mort's direction on credibility did not need to be confined to the defendant's convictions for dishonesty

- Inform the jury that they must decide (1) when evidence of bad character is disputed, whether they are sure it is proved, (2) whether the evidence establishes, so that they are sure, the propensity or other matter in issue and (3) to what extent, if any, their finding assists them to resolve the ultimate issue of guilt
- Warn the jury against unfair prejudice or over-reliance on bad character evidence

Illustration - propensity to commit the offence charged – relevant bad character agreed – identifying particular features relied upon – factual conclusion of propensity for the jury – weight for the jury – defence submissions - warning against prejudice and over-reliance on propensity evidence

You have heard evidence that the defendant has convictions for....Let me remind you of the agreed facts of those convictions....They are set out in your bundles in the formal admissions.

You have heard of the defendant's previous behaviour because it is relevant to the question whether he has a propensity, in other words a tendency, to commit offences of the kind with which he is now charged. The particular features of those convictions on which the prosecution relies are....The prosecution submits that if the defendant does have a propensity to act in this way, then it is more than mere coincidence that V described him as acting in a similar way on this occasion. It makes it more likely that he behaved as V has described.

The purpose of this evidence is not to generate unfair prejudice towards the defendant and you must guard against that. The fact that the defendant has convictions cannot of itself prove his guilt of this offence and should not convict him just because or mainly because of them.

First, you should consider whether the evidence of the defendant's previous convictions establishes that the defendant has a propensity or tendency to..... You must first decide whether the propensity is proved so that you are sure. If it is proved you must, secondly, decide whether and to what extent that helps you when you are discussing whether the defendant is guilty of the offence charged. If you are not sure the propensity is proved it cannot assist you in this way. Even if you accept that the defendant has a propensity to commit offences of this kind it does not necessarily follow that he is guilty on this occasion.

The second way in which evidence of the defendant's character may assist you is in considering whether he has given truthful evidence. The defendant has convictions for dishonesty. That does not establish that the defendant is necessarily or is always an untruthful person, nor does it mean that he cannot be telling the truth now. Whether the evidence provides you with any assistance in this respect is also for you to judge.

The defence say that the defendant's past behaviour cannot or should not assist you because.....

Please bear in mind that this evidence of the defendant's previous behaviour is but a small part of the evidence in the case. You will appreciate that it is not direct evidence that the defendant committed the offence but of circumstances concerning the defendant which you are entitled to take into account when deciding whether he did.

Illustration - bad character evidence not involving convictions – evidence given by other ‘complainants’ - disputed similar fact – assessment of the evidence – similar fact - unlikelihood of coincidence and propensity – eliminate collusion – warning about prejudice

You have heard evidence from V. Her evidence is central to the prosecution case and forms the basis of the charges in the indictment. You cannot convict the defendant unless you accept V’s evidence. You have also heard from A and B about incidents unconnected with the charges, save, say the prosecution, for the similarity which the defendant’s conduct towards them bears to V’s description of his conduct towards her.

The evidence of A and B is relevant because it may assist you to decide whether you can accept V’s evidence as truthful and accurate.

Let me explain how you should approach this evidence.

First, the prosecution contends that it is no coincidence that all three of these witnesses describe similar conduct by the defendant towards them. If three women, unknown to one another, make complaints of a similar kind against the same man, and collusion between them can be excluded, it makes it more likely that each of them is telling the truth. The closer the similarity of the conduct alleged the less likely it is that the evidence can be explained away as coincidence or malicious invention. You must examine the evidence with care. If you are sure that collusion or influence by any one witness over another, deliberate or unintentional, can be excluded, then you are entitled to regard the evidence of each witness as supportive of the others. You are not bound to treat the evidence as supportive of V. That is your decision. Furthermore, the extent to which it may be supportive is also for you to judge.

Secondly, the prosecution submits that the evidence of A and B, both women with whom the defendant had enjoyed sexual relationships in the past, establishes that the defendant has a propensity, or tendency, to behave in a particular way towards women when his wishes are thwarted. If you accept that submission, they say the fact that the defendant possessed such a tendency makes it more likely that he behaved towards V as she says he did towards her. You must decide whether A and B gave truthful evidence. If they did, do you conclude that the defendant did have the propensity alleged? If you are sure that is the right conclusion, you must assess whether and, if so, to what extent it helps you to decide whether the defendant is guilty of the charge you are considering. Even if you do decide that the defendant has a propensity to act as the prosecution allege it does not follow that he must be guilty of the offences charged.

I shall remind you in more detail later of the evidence of V, A, B and the defendant, but for the moment let me summarise for you (1) the similarities relied on by the prosecution and (2) the evidence relevant to the issue of independence of the prosecution witnesses from one another.....

The submissions made on behalf of the defendant were.....

Remember that the evidence of A and B is relevant only for the purposes I have described. It would be wrong to take a short cut and say to yourselves, “There is no smoke without fire”. That would amount to unfair prejudice. Remember also that the critical evidence is that of V. The evidence of past behaviour is capable of supporting the prosecution case but it cannot alone prove guilt.

Illustration – evidence of paraphernalia and money – defendant charged with possession with intent to supply – evidence of propensity to deal in drugs – whether the evidence establishes defendant is a current dealer – warning as to prejudice

Found in the defendant's flat were (1) a list of names with figures alongside them, (2) a pair of scales on which traces of cocaine have been found, and (3) in a cardboard box, £1,500 in assorted notes.

I need to explain how you may use this evidence when considering the questions whether (1) the defendant knew that the package found in his kitchen waste bin contained powdered cocaine in wraps and (2) the defendant possessed that package with intent to supply its contents to another or others.

The defendant says that the package must have been placed there by a friend who had recently visited him. He is not prepared to name that person. The defendant said he had no knowledge that the package was there, let alone what it contained. The prosecution case is that the defendant is plainly a drug dealer. No other drugs were found in his possession. The package in his waste bin must have been the stash which he used for trading.

You have heard evidence from DC A that the list of names is typical of the record that a dealer might keep of transactions between himself and his customers. At some stage, the forensic scientist cannot say when, cocaine has come into contact with the scales. The most obvious way in which that contact could have taken place was when the scales were used to weigh the drug. You would not have cause to weigh the drug unless you were dealing in it. The £1,500 in cash cannot speak for itself but you have heard evidence that the defendant has been unemployed and receiving benefits for a period of more than 12 months.

In summary, what the defendant told you about each of these items was.....

You will, first, need to consider the defendant's explanations. If you think they are true or may be true then these items cannot provide any support for the prosecution case. If, however, you reject them as untrue the defendant's possession of these items is capable of establishing that the defendant has dealt in cocaine at some time in the recent past. It is for you to reach a conclusion whether it does or not. If you are sure it does, the prosecution suggests that the fact the defendant is proved to have been be a drug dealer in the past makes it more likely that the drug found in his flat belonged to him and that he intended to supply it to others. That is a decision for you to make.

The possession of the cash in a box under the defendant's bed is particularly significant, say the prosecution, because it suggests that the defendant was an active drug dealer at the time of his arrest. It formed the bank from which he was conducting his business of buying and selling drugs. That is a conclusion you are entitled to reach, but only if you are sure on all the evidence that the cash is explained by the fact that he was a current drug dealer and not merely that he had saved some of the profit on deals he had made in the past. Its significance to the questions you are considering is this: If you are sure the defendant was an active drug dealer at the time the cocaine was found in his bin that may make it more likely that the stash was his. You are not bound to reach that conclusion. You must reach such conclusions as you consider right.

Evidence of a propensity to deal in cocaine is just part of the evidence in the case and it cannot alone provide the answer to it. Remember that if you conclude the defendant had dealt cocaine before, your conclusion does not automatically mean that the package belonged to him and that he is lying about it now. What weight and significance this evidence deserves is for you to determine. What you should not do is convict the defendant out of prejudice just because you are sure he has done it before.

Illustration – charge of possession with intent to supply – defence of ignorance – previous convictions for possession relevant to knowledge but not to propensity – warning as to limited use

The defendant admits that he was paid £500 to drive a package weighing 6 kilos from London to Newcastle. He says that he had no idea the package contained skunk cannabis and had no reason to suspect that it did.

The prosecution case is that the circumstances in which he collected and delivered the package make it quite clear that the defendant knew what he was doing. You have, in addition, heard that the defendant has three previous convictions for possession of class A and B controlled drugs. The mere fact that the defendant had in the past acquired drugs for his personal consumption does not make it more or less likely that he committed this offence, but his convictions are relevant in a specific and limited way. They are capable of demonstrating that the defendant was not unfamiliar with the trade in controlled drugs. He was not, in other words, being exposed to a trade of which he was completely ignorant and naive. That fact is relevant to the question whether the defendant knew or had reason to suspect that he was delivering a package of controlled drugs. In this way, they impact on your consideration whether you conclude that the defendant's evidence is true or false. Whether these convictions have this effect is a matter for you, as are all questions of the weight and significance of evidence.

(ii) Propensity for Untruthfulness

Distinction between propensity and creditworthiness

It is necessary to distinguish between evidence of bad character going to the issues of:

- (1) the defendant's creditworthiness (general bad character relevant);
- (2) a propensity to be dishonest (other dishonest behaviour relevant); and
- (3) a propensity for deceitfulness/telling lies (other deceitfulness/lying relevant).

As to (1) above, any form of other offending behaviour is capable of affecting a witness' creditworthiness, although the nature of the offending may determine the degree to which that creditworthiness is affected.

As to (2) above, past dishonest behaviour may establish a propensity to act dishonestly. It may therefore be admitted under section 101(1)(d) and section 103(1)(a) where dishonesty in the commission of the offence is an issue between the defendant and the prosecution. Past dishonesty may also be capable of affecting the defendant's creditworthiness as a witness, as may any other evidence of his bad character. This does not mean, however, that the evidence is capable of establishing a propensity for untruthfulness. Dishonesty is not synonymous with untruthfulness, although untruthfulness may be a feature of dishonesty.³⁴⁶

As to (3) above, the issues (i) whether the evidence is capable of establishing a propensity for untruthfulness and (ii) if so, whether it should be admitted or used for that purpose is more complicated.

(i) Dishonesty alone cannot establish a propensity for untruthfulness.³⁴⁷ It is suggested that the evidence must concern lying or deceitfulness on other occasions.

(ii) In *Campbell*³⁴⁸ Lord Phillips CJ observed that a propensity for untruthfulness is not in most cases going to help the jury to resolve *guilt* because guilt is a motivation for lying, even if the defendant has not previously demonstrated a tendency for lying, and innocence is a motivation for telling the truth, whether the defendant had a propensity for lying or not. For this reason,³⁴⁹ the only circumstance in which there is likely to be an *important* issue as to whether the defendant has a propensity to tell lies is where telling lies is an element of the offence charged. In that circumstance, there is likely in any event to be a propensity to commit offences of a similar kind which would be admissible under sections 101(1)(d) and 103(1)(a).

Whether or not the evidence is capable of establishing a propensity for untruthfulness, it may be relevant to the defendant's general creditworthiness as a witness (as in (1) above). At paragraphs 34 and 35 of *Chohan*, Lord Phillips expressly approved HH Judge Mort's direction (a case of alleged robbery and possession of firearms) to the effect that the jury could consider the defendant's previous convictions for offences which involved dishonesty when judging whether the defendant had given truthful evidence, notwithstanding that they had already received a propensity direction. It is suggested that although the credibility direction was justified by Judge Mort on the ground that the previous convictions were for offences of dishonesty there is no reason in principle why convictions for the other offences should not also have been treated as relevant for this purpose.

Footnotes

³⁴⁶ See *Hanson* [2005] 1 WLR 3169, [2005] EWCA Crim 824

³⁴⁷ *Hanson* [2005] 1 WLR 3169, [2005] EWCA Crim 824

³⁴⁸ [2007] EWCA Crim 1472

³⁴⁹ §31

A conclusion that a defendant has a propensity for untruthfulness, founded upon a track record for telling lies, is not, of course, the same thing as a conclusion that the defendant's general bad character affects his or her creditworthiness as a witness. *A propensity for untruthfulness bites directly upon the important matter in issue*, while general bad character going to creditworthiness does not.

Section 101(1)(g) demonstrates that the Act itself draws a distinction between a defendant's propensity for untruthfulness, his dishonesty and his general creditworthiness. Once the defendant has made an attack on another's character, evidence of his own bad character is admissible, subject to fairness (section 101(3)), whether or not the bad character disclosed embraces a propensity for untruthfulness or dishonesty.³⁵⁰ It is admissible to enable the jury to consider whether the attack made is worthy of belief.³⁵¹ While recognising the 'common sense' in not complicating a propensity direction by references to credibility, it does not appear that the Court in *Campbell* was intending to prohibit such directions where the facts of the case justify it.³⁵²

When does section 103(1)(b) apply?

Section 103(1)(b) provides:

"(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include –

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

The reference in subsection (1)(b) to "the defendant's case" demonstrates at least one aspect of its purpose. Where an important matter in issue between the prosecution and the defence is whether the defendant's case is untrue, evidence of a propensity for untruthfulness is admissible.³⁵³

Section 103(1)(b) applies only to evidence which is capable of establishing a propensity to be deceitful or to tell lies, and evidence of such a propensity is admissible only when it is an important matter in issue between the prosecution and the defendant.

A propensity for deceitfulness or telling lies *may*, but will not necessarily, be an *important* matter in issue between the prosecution and the defence, either when an element of the offence charged is fraud, lies or deceit, or when it is the prosecution case that the defence put forward by the defendant is the product of fraud, lies or deceit.

That does not mean that the evidence of past untruthfulness should be admitted or, if admitted, used for the purpose of undermining a defence to a charge which does not involve untruthfulness. The judgement must be one formed after considerations of the importance of the issue, fairness and prejudice. For the reason given in *Campbell*, a propensity for untruthfulness may not be sufficiently probative of the falsity of the defendant's case that it ought to be admitted or used by the jury for that purpose. In any case, a propensity for untruthfulness is not necessarily established by proof of past dishonesty.³⁵⁴

Footnotes

³⁵⁰ *Lafayette* [2008] EWCA Crim 3238; *Hearne* [2009] EWCA Crim 103

³⁵¹ *Lafayette* at paragraphs 46 and 47

³⁵² See also Directions (i) Propensity to Commit Offences of the Kind Charged above.

³⁵³ Note also the terms of section 104(1) concerning issues between co-defendants

³⁵⁴ *Hanson* [2005] 1 WLR 3169, [2005] EWCA Crim 824 at §13: "Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity for untruthfulness where...truthfulness is an issue and... either there was a plea of not guilty and the defendant gave an account on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations...."; and at §9: "There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity...."

Illustration – fraud - false representation - crime involves untruthfulness – previous conviction and other behaviour capable of establishing a propensity for untruthfulness – relevant to offence charged and to the defendant’s evidence – warning against prejudice – warning against undue weight

The defendant is charged with fraud by falsely representing on his website that he would provide a return of 10% pa by investment in a “blue chip” company. By this means he obtained over £250,000 from several investors who say they thought their money was safe. Most of their money was lost following its transfer to A Ltd., a property company of which the defendant’s wife was the sole director and shareholder. The defendant accepts that his wife obtained A Ltd. off the shelf for the purpose of receiving funds for investment in a rented property portfolio. His case is that he honestly believed that the description “blue chip” applied to A Ltd. because he could not envisage it failing. The prosecution must, in respect of each count, prove that (1) the representation was untrue or misleading, (2) the defendant knew that the representation was or might be untrue or misleading, (3) the representation was made dishonestly and (4) the defendant intended to make a gain for himself or to expose the loser to a risk of loss.

You have heard evidence that within the last five years the defendant:

- (1) made false representations in his CV to obtain employment with X Ltd;
- (2) concealed from his trustee in bankruptcy the existence of assets which should have been made available to his creditors;
- (3) was convicted by the magistrates of an offence of displaying a forged vehicle excise licence on a motor car;
- (4) in breach of a restraining order made in matrimonial proceedings attempted to obtain a second mortgage on his matrimonial home by falsely representing that the property was unencumbered.

The central issue for you to resolve is whether, when the defendant made the invitation to invest, he knew that the term “blue chip” was or might be untrue or misleading and, on that account, dishonest. You have heard this evidence, not in order to cast the defendant in a bad light, but, because it is, depending on your view, directly relevant to the central issue whether he made false or misleading statements dishonestly. The prosecution argues that the defendant’s conduct on other occasions demonstrates his propensity to be untruthful in his business and personal financial affairs. This should, submits the prosecution, assist you to the conclusion, first, that he is more likely to have been untruthful with his investors as the prosecution contends and, secondly, that his present claim in evidence to have believed in the truth of his representation is false.

Let me explain how you should approach this evidence.

You should first decide whether you accept some or all of the evidence of the defendant’s deceit and untruthfulness on other occasions. If you do, you should next assess whether that evidence establishes that the defendant has the alleged propensity to be untruthful. If you are sure he does, you are entitled to have regard to that conclusion when deciding whether (1) he knew when he made the invitation to investors that his “blue chip” representation was or might be untrue or misleading and (2) the defendant’s evidence in this respect was true or false.

In a moment I shall remind you of the evidence relied on by the prosecution to establish the propensity and the defendant's evidence in response. The defence submits that even if you do conclude that the defendant has been untruthful or deceitful on other occasions you should not derive any assistance from it because.....

Remember that evidence of previous behaviour is just part of the evidence in the case. It is for you to decide how important a part, but the critical evidence concerns the offences now charged in the indictment. Proof that the defendant has a propensity to be untruthful does not alone prove that he deceived his customers or has lied to you on this occasion.

Illustration – allegation of false alibi – previous conviction after a false alibi – relevant to untruthfulness of the defence case – warning as to limitations of the evidence – warning as to undue weight

In his interview with the police the defendant made no comment to questions asked about his movements. Not until he served a defence statement, two weeks before the trial began, did the defendant disclose that he had an alibi for the time of the robbery. I have explained how the failure to disclose his alibi when interviewed may, depending on your view, count against him.

The defendant gave evidence in support of his alibi and he was supported by A. They said that at the time of the robbery they were walking together from the defendant's home to a public house in the High Street, the street where the robbery took place. You will recall that counsel for the prosecution asked the defendant about his previous conviction 12 months ago for an offence of burglary. The defendant on that occasion called B to support his evidence of alibi. They said they were drinking together in a public house. The jury disbelieved them.

The conviction for burglary is of no significance to your consideration of the evidence and you should not treat it as any support for the prosecution case. However, the alibi the defendant then put forward is relevant. An important issue in this trial is whether the prosecution has proved that the defendant was the man with the handgun. You have seen the CCTV evidence, which the prosecution accepts is inconclusive. You have heard the scientific evidence which may implicate the defendant through head hair found on the balaclava recovered not far from the scene. The defendant has given an explanation for the presence of his hair on that item which you will need to examine. If, however, you were to conclude that the defendant's alibi is true or may be true then, plainly, you could not also conclude that the defendant was present at and taking part in the robbery.

The prosecution case is that the alibi put forward by the defendant and A is contrived, untrue, and a late attempt by the defendant to deal with the prosecution evidence linking him with the robbery. The prosecution suggests that, apart from the unsatisfactory nature of the evidence given by the defendant and A, the defendant is a man who is prepared to organise false evidence of alibi in an attempt to escape the consequences of his participation in crime. That makes it more likely that he has done the same thing on this occasion.

The defendant does not dispute that he gave alibi evidence at his trial for burglary which was disbelieved. However, despite the jury's verdict, he continues to maintain that it was true. You must consider, first, whether the prosecution has established so that you are sure that the defendant and B knowingly gave false alibi evidence at the burglary trial. If you are sure they did, then you should decide whether that establishes a propensity in the defendant to manufacture evidence when it suits him. You are not bound to reach that conclusion and if you are not sure the propensity is established you should put this evidence to one side and ignore it. If you are sure the propensity is established, you are entitled to bear it in mind when judging the question whether the defendant's present alibi is false.

It was argued on behalf of the defendant that....

Please remember that this evidence of the earlier trial cannot prove the defendant's guilt of the present charge of robbery. What it does, at most, is to place before you circumstances which you would wish to know about before deciding whether you can place any reliance on his present alibi. It does not necessarily follow that because the defendant has told lies about an alibi on an earlier occasion he has done so again on this. Even if you were sure that the present alibi is false, that does not by itself entitle you to convict the defendant. You must be sure that he was the man with the handgun. You may certainly take the false alibi into account but you should bear in mind that an alibi may be invented by an innocent defendant who thinks it is easier to present an alibi than it is to put forward a genuine defence.

(iii) Defendant's Signature

Identification of the offender may be an important matter in issue between the prosecution and the defence. Bad character evidence linking the defendant with the crime is admissible under gateway (d). Evidence of idiosyncratic ('signature') behaviour by the offender which the defendant has exhibited on other occasions may be admitted to support an identification of the defendant by a witness and/or as part of a circumstantial case. The signature behaviour may be so idiosyncratic and, on that account, compelling, that it is the foundation of the prosecution case; alternatively, the behaviour may be more commonplace but, considered with other circumstances, probative of guilt.

The judge will need to assess the prominence of the signature evidence in the prosecution case and to direct the jury accordingly. It may or may not be appropriate to remind the jury that the bad character evidence is but a small part of the evidence in the case. The more significant it is so, correspondingly, is the need for careful examination of the evidence and the conclusions to be drawn from it.

Illustration – stolen car used in robbery – evidence linking the defendant with the car is bad character evidence – warning against prejudice – modified Hanson direction

As I have explained, the prosecution case is circumstantial. One of the prominent circumstances relied upon by the prosecution is the fact that the robber used a distinctive customised motor car. That car was captured on CCTV being driven away from the scene. It was later found several miles away, burned out. The last change of ownership was registered 3 years ago and the owner was not the defendant. The car was reported stolen 3 months ago. At the time it was stolen the car had none of these distinctive features. There is no evidence who stole the car and who customised it.

There is no evidence from witnesses unequivocally identifying the robber. He was wearing a short leather jacket and a balaclava worn as a face mask. A balaclava of similar appearance was found at the defendant's home tucked into the pocket of his black leather jacket. Strands of his hair were found inside it.

The prosecution contends that whoever was using that car was the man who committed the robbery. The prosecution say that man was the defendant. To prove it, they rely upon a violent incident which happened just two hours before the robbery. That is the only reason you have heard this evidence. It is directly relevant to the issue you have to decide, and you should not allow the assault on Mr A to prejudice your minds against the defendant.

Mr A told you he was stationary at a set of traffic lights when the defendant came up behind him. The defendant failed to brake in time and a slight collision occurred. Mr A got out of his car and went to the rear to inspect his car for damage. Simultaneously, the defendant got out of his car and told Mr A to leave it and drive on. When Mr A refused and asked for his details, the defendant punched him repeatedly around the head and face, got back into the car, reversed and then moved out into the second lane to make good his escape. While he was doing that, Mr A had the presence of mind to photograph the car with his mobile telephone. After the defendant's arrest for robbery, Mr A identified him at an identification procedure as the man who attacked him at the roadside.

The defendant chose to make no comment during his interview under caution and he has not given evidence. Mr A's identification of him has been challenged.

Let me explain how you should approach the evidence in stages.

You must first consider the prosecution's assertion that the distinctive car to be seen in the CCTV film was the car used by the robber. There appears to be no challenge to that assertion. Secondly, you should examine Mr A's photograph. Are you sure that the car in that photograph was the same car as the car used in the robbery? Thirdly, you must consider the evidence of Mr A's identification of the defendant as the man who attacked him and drove away in that car. Are you sure that man was the defendant? I will give you further directions about this in a moment. Fourthly, can you infer, so that you are sure, that the man in possession of the distinctive car when the robbery took place was the defendant? In considering this final link you are entitled to take into account the defendant's possession of the leather jacket and balaclava found at his home.

You will see that each link in the chain of circumstantial evidence is important. You should look at all the circumstances and consider whether they lead you to the sure conclusion that the defendant is guilty.

Illustration – burglaries bearing a rare or unique similarity – assessment of similarities and differences – propensity cannot prove guilt – warning against prejudice

The defendant is charged with three burglaries of substantial dwelling houses committed during the same week in the same district of Cardiff. In each case entry was gained through a ground floor window when the premises were temporarily unoccupied. Access had been gained using a blow torch to fracture the glass. The burglar had confined his attention to paintings and ornaments. Nothing else was stolen. There is some scientific evidence which may link the defendant to the last of those burglaries. It comprises the finding of a fragment of glass in a pocket of the defendant's jacket, having the same refractive index as glass found at the point of entry. There is no evidence from any witness which directly identifies the defendant as the burglar.

You have, however, heard evidence that the defendant has a conviction 5 years ago for a series of burglaries which, the prosecution suggests, had features which were strikingly similar to those charged in the indictment. Those similarities are.....

Furthermore, you heard evidence from Det Insp A that, in the experience of the police services in South Wales, Dyfed Powys and Gwent, the only offences recorded in those police areas having all these features were committed by this defendant. They have come across no other such cases since records have been kept. You are invited to infer that each of the three burglaries charged in the indictment was committed by the same man and, given their rare or unique nature, that they are the work of the defendant.

You need to examine this evidence in stages.

First, consider the facts relating to each of the burglaries, those charged in the indictment and those to which the defendant pleaded guilty in the past. What are the similarities between them?

Second, decide whether the similarities are so striking and singular that you can be sure they reveal a pattern of offences committed by the same man. If you were to conclude that any one of the burglaries charged in the indictment does not, or may not, fall into the pattern you have identified, you should exclude it from your consideration and return, in respect of that count, a verdict of not guilty.

Third, if the singular nature of the burglary you are considering drives you to the sure conclusion that it was committed by the defendant, your verdict in respect that count would be guilty.

It is submitted on behalf of the defendant that while each of the burglaries, past and present, has these features in common, some of them have additional features which differ. They are....If you accept that those differences are present or may be present, you will need to consider whether they are of any significance. If they are, ask yourselves whether the existence of those differences undermines the case put forward by the prosecution that these are all burglaries committed by the same person. If you think they do undermine or may undermine the prosecution's circumstantial case, your verdicts should not be guilty.

It was also submitted that 5 years have elapsed since the defendant's conviction. During his prison sentence he will inevitably have told inmates about his offending. You cannot be sure that someone else was not operating the same method of entry and targeting similar property when the recent offences were committed. In deciding whether that is a realistic possibility you are entitled to take account of the glass found in the defendant's pocket and the other, less prominent, circumstances which, the prosecution submits, points to this defendant as the burglar.

What you should not do is take a short cut. It would be unfair to the defendant if you were tempted to say that because he has committed a burglary like this before he must have done it again. You may come to the conclusion that the defendant undoubtedly had a propensity to commit the offence of burglary in this unusual way but that is not enough. The prosecution must make you sure, by the quality of the evidence of similarity, the absence of significant differences and the circumstances proved, that these burglaries bear his signature and no-one else's.

(iv) Rebutting a Defence

While not strictly similar fact or signature evidence, bad character evidence which tends to undermine a defence such as innocent association or lack of knowledge may be relevant to an important matter in issue between the prosecution and the defence and admitted as such under section 101(1)(d).

The purpose for which the evidence was admitted is likely to have been quite narrow and, unless the evidence has become relevant for a wider purpose, the jury should be told of its limited application.

Illustration – fraud - alleged dishonest expense claim – previous warning as to future conduct – relevance of warning to defendant’s state of mind – warning against prejudice

The defendant has told you in evidence that when he submitted his claim to X Ltd for the expenses of a conference visit to the Hotel Miramar in Malaga for four days, he believed that he was entitled to include the cost of taking his wife and two children as well. He says that for this reason his claim was not dishonest.

You have heard that 2 years ago, when the defendant was employed by the Y Borough Council, he was suspended while he was investigated for a similar alleged irregularity, and given a final warning as to his future conduct. You have heard this evidence because it is directly relevant to an issue you have to decide and not in order to cause the defendant unfair prejudice.

The defendant told you that he did not on that earlier occasion think he had done anything wrong either. He thought, wrongly as it turned out, that the leader of the council had done something similar. The defendant accepted the final warning as a compromise.

The prosecution does not rely on these past events to prove that the defendant has done it before. They rely only upon the fact that, whatever the propriety of the previous expenses claim, the defendant received a warning as to his future conduct.

When considering whether the defendant made his claim for business expenses to X Ltd knowing that it was untrue or misleading, and therefore dishonest, you are entitled to take account of the defendant’s earlier warning about the propriety of claiming expenses for his family as if they were incurred as a business expense. What matters is not whether the earlier claim was dishonest but whether the defendant must, as a result of the investigation and warning, have known where the line of propriety should be drawn.

It does not, of course, follow that because the defendant was warned by a public authority in the past, he was necessarily acting dishonestly when he made a similar claim to X Ltd. It is just one of matters you are entitled to consider when judging whether he was acting honestly or dishonestly and when considering his explanation in evidence. How much weight you attach to the defendant’s previous claim and its consequences are decisions for you to make.

Illustration – possession of class A drug with intent to supply – denial of knowledge of contents of holdall left for minding – relevance of previous convictions for drugs offences – relevance of knowledge of drugs trade

The defendant admits that he was given the holdall by his friend A. He was told to mind it for a day, after which it would be collected. He knew there must be something in the holdall. He admits that the holdall in fact contained 14 packages of cocaine.

However, the defendant denies that he had any knowledge that the substance in the holdall was a controlled drug. If the defendant did not suspect and had no reason to suspect that the holdall contained a controlled drug of any description, he is not guilty of the offence charged in the indictment. If you are sure that the defendant suspected or had reason to suspect that the holdall contained controlled drugs your verdict would be guilty. If you are not sure your verdict would be not guilty.³⁵⁵

In considering the question whether the defendant had reason to suspect that the holdall contained controlled drugs, the prosecution relies on the circumstances in which the holdall was left with the defendant and his knowledge of A's involvement with drugs as a long term user.

The defendant told you he was naive; as a result, his suspicion was not aroused and it did not occur to him to ask questions.

The defendant has previous convictions 12 months and 18 months ago for possession of class A drugs and skunk cannabis. You have heard this evidence because it is relevant to the question you have to decide and not to prejudice your minds against him. You are entitled to take those convictions into account when considering the truthfulness of the defendant's claim to have been ignorant and naive. Is a man who is or has been himself a drug user and, on that account, familiar with the world of drugs more likely to have his suspicions raised by a request of this kind? Bear in mind that the defendant was convicted some time ago and that the defendant denies that he has since been a drug user. Do not jump to the conclusion that because the defendant was in the past a drug user he must be guilty. This is just one of circumstances you should consider. The defendant's convictions cannot alone prove his guilt.

Sources

Archbold 13-1/10; 13-25/119; Blackstone F12.1/47

Footnotes

³⁵⁵ See section 28(2) Misuse of Drugs Act 1971 and Lambert [2002] 2 AC 545

(3) Section 101(1)(e): Evidence of Substantial Probative Value in Relation to an Important Matter in Issue Between a Defendant and a Co-Defendant

Introduction

1. Section 101(1)(e) Criminal Justice Act 2003 permits evidence of the bad character of a defendant (D2) to be given on the application of another co-accused (D1), but only if the evidence has “substantial probative value in relation to an important matter in issue between” them. This will usually arise when the defendants are engaged in “cut-throat” defences.
2. Gateway (e) is not limited to evidence of propensity to untruthfulness but, if that is the purpose for admitting the evidence, it may only be admitted (section 104(1)) if the nature or conduct of D2’s case is such as to undermine D1’s defence. Section 104 provides:

“Matter in issue between the defendant and a co-defendant

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.

(2) Only evidence—

(a) which is to be (or has been) adduced by the co-defendant, or

(b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant,

is admissible under section 101(1)(e).”

3. Once the threshold test is passed the judge has no discretion to exclude the evidence.
4. The Court of Appeal has in three cases given a wide interpretation to the scope of gateway (e). In *Lawson*³⁵⁶ D1, D2 and D3 were charged jointly with manslaughter. D3, who pleaded guilty, had pushed V, a non-swimmer, into deep water and V drowned. D1 and D2 each gave evidence whose effect was to undermine the other’s account of his own intention. The Court upheld the trial judge’s decision to permit D1 to adduce D2’s conviction for assault. Hughes LJ said:³⁵⁷

“28 In order for the evidence of his [D2’s] conviction to be admissible, two further conditions [the first being the importance of the matter in issue] had to be met:

(a) because it was a question of Lawson’s truthfulness or credibility as a witness, the bad character evidence could be adduced only if the nature or conduct of his defence was such as to undermine the defence of King (see s.104(1)); and

(b) if that condition was satisfied, the bad character evidence had to have substantial probative value in relation to the issue of Lawson’s truthfulness or credibility. For that see s.101(1)(e) .

Footnotes

³⁵⁶ [2007] 1 WLR 1191; [2007] 1 Cr App R 11; [2006] EWCA Crim 2572

³⁵⁷ At §28 and 29

29 It is apparent that there is an element of overlap between the questions whether there arose an important matter in issue between the defendants, whether the defence of Lawson undermined that of King and whether the proposed evidence had substantial probative value. This, as it seems to us, will often be the case but it remains necessary for the question to be addressed *seriatim*.”

He continued at paragraph 34:

“A defendant who is defending himself against the evidence of a person whose history of criminal behaviour or other misconduct is such as to be capable of showing him to be unscrupulous and/or otherwise unreliable should be enabled to present that history before the jury for its evaluation of the evidence of the witness. Such suggested unreliability may be capable of being shown by widely differing conduct, ranging from large scale drug-or people-trafficking via housebreaking to criminal violence. Whether in a particular case it is fact capable of having substantive probative value in relation to the witness’ reliability is for the trial judge to determine on all the facts of the case.”

5. In *Rosato*³⁵⁸ the Court followed *Lawson*. On a charge of arson D1 and D2 each gave evidence that the other acted alone. D1 was permitted to adduce in evidence D2’s convictions for dishonesty.
6. In *Jarvis*³⁵⁹ there was a cut-throat defence between D1 and D2 who were both charged with theft of jewellery from V. Each said the other had last been in possession of the jewellery. D2 made a late application to adduce evidence that D1 had in the recent past dishonestly run up a credit card debt of £75,000 using a company credit card. The Court held that the evidence was rightly admitted whether it was evidence of a propensity for untruthfulness or not.
7. Thus, previous convictions may be admissible notwithstanding that they are incapable of establishing a propensity for untruthfulness. It is enough if (1) the issue between the defendants is important and (2) the evidence of bad character is of substantial probative value in a consideration of that issue.

Directions

Discussion with the advocates is required.

Evidence admitted under gateway (e) is unlikely to become relevant to an important matter in issue between the prosecution and the defendant if it has not already been admitted under gateway (d) on the application of the prosecution. If it has become relevant (e.g. to propensity to commit such an offence) the jury will require a direction explaining its relevance in that context. If it is not relevant to propensity to commit the offence and there is a risk that the jury may treat it as such they should be warned against using it for that purpose.

Where the sole purpose of the evidence is to balance D2’s attempt to undermine D1’s case the direction can be given quite shortly.³⁶⁰

Footnotes

³⁵⁸ [2008] EWCA Crim 1243

³⁵⁹ [2008] EWCA Crim 488

³⁶⁰ *Rosato* at §26

Illustration – D2 blames D1 – D2 has relevant convictions but he has always pleaded guilty – relevance to assessment of D2's evidence - warning against using convictions to support prosecution case

In the course of his case and during his evidence D2 has sought to place all blame for this offence on D1.

I have already advised caution when you are considering what one defendant has said against the interests of another.

You have heard evidence of D2's convictions for wounding, burglary and theft. When assessing how much reliance, if any, you can place on D2's accusation against D1, you are entitled to take into account what you know about D2's past conduct. It is submitted on behalf of D1 that D2's past behaviour demonstrates his willingness to engage in conduct which is deceitful, unscrupulous and violent. It is submitted on behalf of D2 that while he has been convicted in the past it has always been upon his own admission and, therefore, his convictions demonstrate only his truthfulness as a witness.

Whether these convictions assist you to judge the reliability of D2's accusations against D1, and if so to what extent, is for you to decide.

There is no other respect in which those convictions are relevant. In particular, they do not in any way assist the prosecution to prove its case against D2.

(4) Section 101(1)(f): Evidence to Correct a False Impression Given By the Defendant

Introduction

1. Section 105 Criminal Justice Act 2003 provides:

“Evidence to correct a false impression

- (1) For the purposes of section 101(1)(f)—
 - (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
 - (b) evidence to correct such an impression is evidence which has probative value in correcting it.
- (2) A defendant is treated as being responsible for the making of an assertion if—
 - (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
 - (b) the assertion was made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it,
 and evidence of the assertion is given in the proceedings,
 - (c) the assertion is made by a witness called by the defendant,
 - (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
 - (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.
- (3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.
- (4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.
- (5) In subsection (4) “conduct” includes appearance or dress.
- (6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.
- (7) Only prosecution evidence is admissible under section 101(1)(f).”

Thus, the false impression it is sought to correct may have been given in interview under caution with the defendant, or in evidence by the defendant himself or by another at the invitation of the defence.³⁶¹

2. By subsection (3), the defendant's responsibility for the false impression may be avoided if he withdraws or disassociates himself from it. Thus, where the impression is given in interview, it may be avoided by agreed editing provided that the interview is not thereby deprived of its effect. Where, however, the defendant maintained the false impression in evidence until forced in cross examination to concede, the prosecution was permitted to adduce the contrary evidence, since the concession could not properly be described as a withdrawal or disassociation.³⁶²
3. In *B*³⁶³ the defendant was charged with sexual offences against children, including the rape of his 13 year old daughter. In interview he had been asked whether he had any sexual interest in children. The defendant replied "No, not at all. That's disgusting to even think about that". The prosecution adduced the reply in interview with the intention of applying for the admission of evidence of a witness who said that when she was aged about 14 years the defendant had shown her a book about 'sex positions'. The trial judge admitted the evidence. The court declared that the calculated use of gateway (f) to trigger evidence of this kind was unfair, and noted the ability of the defendant to withdraw a false impression. Since in that case, however, the court also approved the admission in evidence of a previous conviction for rape of a 16 year old in support of an assertion of propensity to rape, it was recognised that withdrawal of the impression made in interview would hardly have assisted the defendant.
4. Once the threshold to admissibility is passed, section 78 PACE 1984 provides the only discretion to exclude.

Directions

It is unlikely that the evidence will also be relevant to an important matter in issue between the prosecution and the defence unless the prosecution has already made a successful application under gateway (d). If it is, the jury will require an explanation of its relevance in that respect after discussion with the advocates.

Illustration – in interview the defendant claims he would never use violence – previous conviction for burglary involving violence – relevant to false impression, credibility and propensity – warnings about propensity

You have heard that the defendant has a previous conviction for burglary. The facts of the burglary, which the defendant now admits, were that, having gained entry to the home of an elderly resident, she confronted him and he pushed her to the ground in order to make good his escape. That knowledge can affect your consideration of the evidence in two ways.

The first concerns your assessment of the truthfulness of the defendant's interview under caution and his evidence. In interview the defendant said he would never use violence, least of all against an elderly person. It has been shown that the defendant has in the past used violence towards an elderly person. Asked in evidence to explain his remark in interview, the defendant said he had not meant to conceal anything; he

Footnotes

³⁶¹ See section 105 Criminal Justice Act 2003

³⁶² *Renda* [2005] EWCA Crim 2826

³⁶³ [2008] EWCA Crim 1850

was talking about his state of mind when he was interviewed, not what he had done in the past. You must judge the defendant's truthfulness in interview and in evidence. If you concluded that the defendant was, in interview, giving a distorted impression of himself, that conclusion could not, of course, prove his guilt of robbery. At most it would help to correct any such impression. If you are not sure that the defendant was trying to create a false impression of himself then his previous conviction is of no assistance in this respect.

Secondly, the prosecution draws attention to the similarity between the defendant's conduct during the burglary and the facts of the present robbery. V is an elderly man who was pushed to the ground before his wallet was stolen. He has identified the defendant as the robber. The prosecution argues that the defendant's conduct during the burglary demonstrates that he has a willingness or propensity to use force against a vulnerable victim when committing an offence of theft. That propensity makes it more likely that the defendant was the robber. You should first consider whether the facts of the burglary do demonstrate in the defendant a propensity to commit crime by using force towards a vulnerable victim. If you are sure they do, you are entitled to treat that conclusion as some support for the identification by A that it was this defendant who robbed him. Whether it does support the prosecution case and, if so, to what extent, are both matters for you to decide.

It is argued on behalf of the defendant that the offences committed were very different in kind. One was a burglary during which the confrontation was unexpected; the other was the deliberate targeting of an elderly victim. It is submitted it would be unsafe to conclude that the defendant had any propensity to commit an offence such as robbery.

You must judge these competing submissions. Please remember that you must be sure about the identification. Do not give undue prominence to the facts of the previous conviction. The defendant's conviction for burglary cannot, of itself, prove his guilt of robbery. Just because the defendant behaved badly on a previous occasion does not mean that he acted as the prosecution allege on this occasion.

Illustration – charge of fraud – defendant claims he is not the sort of person – convictions for theft – warning against treating as evidence of propensity to commit fraud

The defendant is charged with fraud by obtaining money dishonestly from householders to whom he falsely claimed that their roofs needed urgent repair.

You have heard that the defendant has previous convictions for theft from shops. You have heard about them only because, during his evidence, the defendant asserted that he is not the kind of man who would act deceitfully as the prosecution allege. Had that assertion gone unchallenged you may have been left with a false or misleading impression about the defendant's character. That is why you heard about his previous convictions. When asked to explain his evidence, the defendant said he had no intention of misleading you. He continued to maintain that he is not the kind of man who would make approaches to elderly residents with the intention of deceiving them. You must judge whether the defendant was attempting to give a false impression about the nature of his character. If you conclude that he was not or may not have been attempting to give a false impression of himself, these convictions are quite irrelevant and you should put them aside.

While theft from shops is a kind of dishonesty which you may conclude has an element of deception about it, the circumstances of the offences of the fraud now alleged are very different from shoplifting. Those convictions are therefore irrelevant except to correct any false impression given in evidence. They are of no other assistance to you in judging whether the prosecution has proved its case.

(5) Section 101(1)(g): Defendant's Attack on Another Person's Character

Introduction

1. Section 106 Criminal Justice Act 2003 provides:

“Attack on another person's character

- (1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—
 - (a) he adduces evidence attacking the other person's character,
 - (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
 - (c) evidence is given of an imputation about the other person made by the defendant –
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.
- (2) In subsection (1) “evidence attacking the other person's character” means evidence to the effect that the other person –
 - (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
 - (b) has behaved, or is disposed to behave, in a reprehensible way;

and “imputation about the other person” means an assertion to that effect.

- (3) Only prosecution evidence is admissible under section 101(1)(g).”

2. Thus an attack on another person's character includes an imputation made by the defendant that the other person has behaved or is disposed to behave in a reprehensible way. It follows that evidence of the defendant's bad character may be admitted under gateway (g) if the defendant's case is that the victim's own behaviour was reprehensible.
3. The evidence must not, however, be admitted (section 101(3)) if on an application by the defendant it appears that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. Section 78 PACE 1984 also applies.
4. In *Nelson* ³⁶⁴ the defendant claimed in interview that an allegation of affray was the result of a conspiracy between V and his neighbour to fabricate a case against him. He also asserted that the neighbour was a drug taker. The neighbour's evidence was not relied on by the prosecution. The trial judge permitted the prosecution to adduce evidence of the defendant's convictions for drugs offences. The Court of Appeal

Footnotes

³⁶⁴ [2006] EWCA Crim 3412, [2007] Crim LR 709

made observations on the appropriate use of section 101(1)(g) by the prosecution. It would rarely be the case that the defendant's convictions should be admitted by reason of an imputation made in interview against an individual other than a witness or a victim. The prosecution should not adduce evidence of an interview simply for the purpose of setting up the defendant for an application under gateway (g). Quite apart from the doubtful relevance of the accusation made against the neighbour, there was unfairness in raising satellite issues. In *Nelson*, however, the same accusation was made against V in cross examination and it continued to embrace the neighbour. Mr Nelson's convictions were properly admitted.

Directions

It not infrequently happens that the prosecution will defer an application under gateway (d), or that the judge will postpone consideration of a gateway (d) application, in order to allow the prosecution case to develop before judging its merits. In the meantime, it becomes clear from cross-examination on behalf of the defendant that the evidence will be admissible under gateway (g). It will always be necessary to consider and discuss with the advocates the question whether the jury may treat gateway (g) evidence of bad character as relevant to any other matter in issue.

Analysis is important because there is a difference of substance in the jury's task of examining evidence to assess (1) the credibility of an attack by the defendant on another's character and (2) the existence of a propensity (a) to commit the offence or to act as alleged by the prosecution or (b) for untruthfulness.³⁶⁵

If, on analysis of the bad character evidence, it could not fairly be taken to demonstrate propensity or to prove some other matter in issue, the judge should give the jury an explicit warning. This problem arose in *Lafayette*³⁶⁶ where the evidence was admitted under gateway (g) but there was some doubt whether it could be utilised by the jury for wider purposes. Hooper LJ said³⁶⁷:

"In many cases at least some of the bad character evidence admitted under gateway (g) will also be admissible under gateway (d) and thus entitle the judge to give a propensity direction (see *Highton* [2005] EWCA Crim 1985). What is the position to-day if the evidence which is admissible under gateway (g) is not admissible under gateway (d) to show propensity? For example, what should the judge say if the evidence under gateway (g) showed only previous convictions for offences of dishonesty and/or drugs offences and/or offences of violence, from any of which the jury would **not** be entitled to conclude that they showed on the part of the defendant a propensity to commit the kind of offences with which he is charged? We think that the better course is for the direction to be so fashioned in a gateway (g) only case that the jury understand that the relevance of these kinds of previous convictions goes to credit and they should not consider that it shows a propensity to commit the offence they are considering, at least if there is a risk that they might do so. That is not to say that the words "credit" and "propensity" should be or need to be used."

As the Court said in *Campbell*³⁶⁸ the jury is not concerned with gateways. The jury needs to be told how the evidence is relevant to their consideration of the case, a direction which should be given in its proper factual context.

Footnotes

³⁶⁵ See Bad Character Section 101(1)(d) : Evidence Relevant to an Important Matter in Issue Between the Prosecution and the Defence (i) Propensity to Commit Offences of the Kind Charged and (ii) Propensity for Untruthfulness above

³⁶⁶ [2008] EWCA Crim 3238

³⁶⁷ §49

³⁶⁸ [2007] 1 WLR 2798; [2007] EWCA Crim 1472

Illustration – defendant charged with offence of violence – defence of self defence – V accused of lying – bad character evidence admitted through gateway (g) includes offences of violence – whether defendant’s accusation is worthy of belief – relevance of previous convictions to defence – limitations of evidence of propensity

You have heard evidence that the defendant has convictions for burglary, wounding, assault occasioning actual bodily harm and threatening words and behaviour. I must explain how that evidence is relevant to your consideration of the case.

The defendant is charged with wounding V with intent to do really serious injury. The prosecution case is that the defendant for no apparent reason took exception to V’s good humour with his friends, picked up a pint glass and thrust it viciously into V’s face. When V was cross examined on behalf of the defendant it was suggested to him that he was lying. It was said that V jumped on the defendant’s back, the defendant instinctively turned, and, with the glass in his right hand, swung out to defend himself. All this was denied by V. When he gave evidence the defendant repeated this account and told you he had no intention of causing injury. His action was instinctive rather than deliberate. He swung out instinctively in self defence and did not appreciate that the glass was in his hand.

The defendant’s case has involved the accusation that V was the aggressor. He has, the defendant says, made up the circumstances of the incident. You will need to decide whether you accept the evidence of V and in order to do so you will have to consider whether the accusation of lying and invention made by the defendant is worthy of belief. In fairness to V and to you it would be wrong for you to be left in ignorance of the character of the man making the accusation. You are entitled to have regard to the defendant’s own character as revealed by his previous convictions when deciding what the truth is. I have said you may have regard to his character. Whether and to what extent it assists you, you must judge.

Depending on your view, there is a second way in which the defendant’s convictions for violence may assist you. I am now excluding the conviction for burglary because in this context it has no relevance. The defendant’s case is that V was the aggressor. The defendant says he acted instinctively in self defence. In judging whether that case is true or may be true you are entitled to have regard to the defendant’s own past behaviour. His conviction for wounding arose from another glassing incident; his conviction for assault occasioning actual bodily harm arose from an argument with a neighbour over a parking space; his threatening words and behaviour were directed at a local shopkeeper who refused to serve him with alcohol on credit. On none of these occasions did he advance any excuse for violence.

The prosecution suggests to you that the defendant has a propensity for unlawful violence committed suddenly and in temper. That makes it more likely that V’s account of the incident is true and that on this occasion, as on the others, the defendant acted suddenly and in bad temper.

The defendant admits his previous convictions and the circumstances of them. You should first consider whether this evidence establishes a propensity in the defendant for unlawful violence as the prosecution suggests. If you are sure it does then you may have regard to that conclusion when deciding whether the defendant attacked V unlawfully on this occasion. Whether it does assist you in this regard and, if so, what weight you attach to it in your deliberations is a matter for you.

It was submitted on behalf of the defendant that the conviction for wounding is now 4 years old. The most recent conviction for threatening words and behaviour was 12 months ago. It was said that the circumstances were very different from those now alleged. He pleaded guilty on each occasion. For these reasons, it was submitted, you should have no regard to any propensity that they may then have demonstrated.

You must judge these competing submissions. Please remember that the bad character evidence is just part of the evidence in the case; how important a part is for to judge, but bad character cannot alone prove guilt. Even if you concluded that the defendant has a propensity for unlawful violence that does not, of itself, mean he acted unlawfully on this occasion. You must, in the end, resolve the question whether the evidence of V was truthful and reliable. If you do conclude that the defendant has a propensity for unlawful violence, and that he acted unlawfully on this occasion, his propensity is not likely to help you to decide whether he intended to cause V really serious injury. In order to make that decision you should concentrate on the circumstances of the assault with the glass as you find them to be.

Illustration – defendant charged with theft – defence involves imputation upon the character of V – previous convictions admitted

When the defendant gave evidence you learned that he had previous convictions for obtaining property by deception and handling stolen property. They were committed 15 years ago when he was aged 20. He has a further conviction for assaulting the police committed when he was arrested for a drink-driving offence last year. I need to explain to you the relevance of that evidence in your deliberations.

The defendant is charged with five offences of theft of valuable equipment from his former employer, Mr A. When Mr A gave evidence it was suggested to him that these were not thefts at all. He had asked the defendant to remove the property so that he could make a false claim to their value from his insurers. Mr A denied that accusation emphatically.

It follows that, either, Mr A has told you the truth and the defendant has made a false imputation on his character, or, Mr A has made a false complaint against the defendant to conceal his own wrongdoing. In judging whether the accusation made by the defendant against Mr A has any truth in it, it is right that you should know the character of the man making the accusation. In considering what the truth is, you are entitled, therefore, to have the defendant's convictions in mind.

It was argued on behalf of the defendant that the dishonesty offences are very stale, and that the assault offence involved no dishonesty. You must have regard to these submissions which in themselves are, of course, right. It is your decision whether your knowledge of the defendant's convictions helps you to resolve the central issue of truthfulness and, if so, what weight you give to it.

Do not, however, fall into the trap of thinking that these convictions help the prosecution case in any other respect. They do not. The fact that the defendant acted dishonestly 15 years ago can have no bearing on the question whether he was likely to steal from his employer on these occasions.

Sources

Archbold 13-1/119; Blackstone F12.1/51; Evidence of Bad Character, 2nd Ed 2009, Professor John Spencer

CHAPTER 12: CROSS ADMISSIBILITY

Cross Admissibility and Bad Character

Introduction

1. Judges who try sexual offences commonly prepare directions to the jury which involve multiple complaints by different complainants. There may be similarities between the complaints which are, by reason of their similarity, mutually supportive; or the existence of multiple complaints may rebut a defence of innocent association. This is the context in which the term 'cross admissibility' has become familiar, although cross admissibility is not confined to trials of sexual offences, particularly where the prosecution case gains its strength from the cumulative effect of the evidence. Such evidence was adduced in support of charges of robbery in *DM*³⁶⁹, *Wallace*³⁷⁰ and *Freeman and Crawford*³⁷¹.
2. Section 101(1)(d) Criminal Justice Act 2003 enables evidence proving guilt of one offence charged in the indictment to establish a propensity to commit offences charged in other counts in the indictment. This has added a second dimension to the expression 'cross admissibility' but it is important to distinguish between the two.
3. Section 112(2) provides:

"Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly."
4. Accordingly, the evidence adduced in support of count 1 may be relevant (as before the 2003 Act – *DPP v. P*³⁷²) to counts 2 and 3 because it negatives coincidence or rebuts a defence, and/or, because (since the 2003 Act) it establishes a propensity to commit offences of the kind charged in count 1 and, as such, is relevant to an important issue between the prosecution and the defence in counts 2 and 3 (see Directions below).
5. The question which has caused difficulty is whether, in a case in which evidence supporting one count is cross-admissible to support another count, a bad character direction is required and, if so, in what terms.³⁷³
6. These difficulties have largely been resolved by guidance given by the Court of Appeal in *DM*³⁷⁴ and *Freeman and Crawford*³⁷⁵. Latham LJ in *Freeman and Crawford* said³⁷⁶:

Footnotes

³⁶⁹ [2008] EWCA Crim 1544

³⁷⁰ [2008] 1 WLR 572, [2007] EWCA Crim 1760

³⁷¹ [2009] 1 Cr App R 11, [2008] EWCA Crim 1863

³⁷² [1991] 2 AC 447

³⁷³ See *Wallace* [2008] 1 WLR 572; [2007] EWCA Crim 1760; *Chopra* [2007] 1 Cr App R 225; [2006] EWCA Crim 2133; *S* [2008] EWCA Crim 544; *DM* [2008] EWCA Crim 1544

³⁷⁴ (supra)

³⁷⁵ [2009] 1 Cr App R 11, [2008] EWCA Crim 1863

³⁷⁶ At §20

"In some of the judgments since *Hanson*, the impression may have been given that the jury, in its decision making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment. A good example is the judgment of this court in *S*.³⁷⁷ We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the defendant's guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility."

Directions

- The first question which the trial judge needs to resolve is whether the evidence the prosecution has adduced in support, say, of count 1 is evidence of "a disposition towards misconduct" by the defendant, not having "to do with the facts of the offence with which he is charged" charged in, say, counts 2 and 3. If it is, then, for the purposes of counts 2 and 3, it is evidence of bad character within the meaning of section 98 by reason of the effect of section 112(2). If, therefore, the evidence of complainant A (count 1) is to be admitted in support of the evidence of complainant B (count 2), and complainant C (count 3), it must pass through one of the section 101(1) gateways to admissibility, and a bad character direction may be required. Commonly, A's evidence will be relevant to an important matter in issue between the defendant and the prosecution upon counts 2 and 3 because it is supportive of the truth of B's and C's complaints.³⁷⁸
- The second question for the judge is for what purpose the jury may use the evidence. It is at this point that it is important to distinguish between (i) evidence which tends to negative coincidence (or to rebut a defence) and for that reason strengthens the prosecution case and (ii) evidence of propensity to commit the offence:
 - (i) The fact that several complaints of a similar kind are made by different witnesses who have not colluded or been influenced deliberately or unintentionally by the complaints of the others, may be powerful evidence that coincidence or malice towards the defendant (or innocent association between the defendant and the complainants) can be excluded.³⁷⁹ Thus, the evidence of each complainant is supportive of the truth of the others.

Footnotes

³⁷⁷ [2008] EWCA Crim 544

³⁷⁸ The critical evidence in support of counts 1 and 2 need not, of course, be the evidence of the complainants. The question is posed as if the judge were dealing with a sexual offences case since that is the context in which cross admissibility most frequently occurs. The evidence might just as well be circumstantial. See, for example, the analysis of Aikens LJ in *Norris* [2009] EWCA Crim 2697 at §§ 80-87 where evidence of behaviour proved in one count (unlawful administration of drugs by a nurse) was evidence relevant to proof of identity of the perpetrator of similar acts alleged in other counts.

³⁷⁹ *DPP v. Boardman* [1975] AC 421 at p. 421, "...the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruthly that the defendant had made homosexual advances to them would have put such a suggestion into his mouth.", per Lord Cross; *DPP v. P* [1991] 2 AC 447; *DM* [2008] EWCA Crim 1544 at §§14-17

(ii) A propensity to commit an offence is also relevant to guilt on other counts but, before the propensity can be utilised by the jury, it must be proved. Only if the jury is sure that the evidence of A is true can they conclude that the defendant had a propensity to commit the kind of offence alleged by complainant B.³⁸⁰

- The third question for the judge is whether the evidence of bad character may be used by the jury both (i) to negative coincidence or rebut a defence *and* (ii) to establish propensity. If so, the jury may require an explanation how the evidence should be approached in these two different ways.
- Finally, if the evidence may be used to establish propensity, the jury should receive the conventional warnings about its limitations based on the factual context of the case.³⁸¹

When to give both directions?

The judgement whether to explain that a conclusion favourable to the prosecution on one count may be evidence from which the jury can *in addition* find a propensity to commit the offences charged in other counts is not always straightforward.

It is suggested that where the evidence on, say, count 1 is, independently compelling and, consequently, the jury is likely to wonder how a verdict of guilty in respect of count 1 may affect their consideration of counts 2 and 3, the propensity direction should be given, because it is only if the jury is *sure* of the propensity that they can utilise the evidence for that purpose.

On the other hand, where is little to choose between the strength of the evidence supporting each of the counts the propensity direction may serve only to confuse because (1) the direction, if given, will be burdened with conditional clauses and (2) in any event, the real question for the jury in such a case is whether the evidence supporting each count tends to strengthen the prosecution case on the others.

In *Crawford*,³⁸² the defendant was charged with two street robberies three weeks apart committed in similar circumstances. Each complainant identified her attacker. There was little, if anything, to choose between the strength of the evidence in each count. In addition, however, the prosecution was permitted to adduce evidence of previous convictions for similar offences. The trial judge gave both a propensity direction in relation to the previous convictions and a cross-admissibility direction in relation to the two counts in the indictment. His directions were upheld.

The jury should always be reminded of the need to return separate verdicts on each count.

Footnotes

³⁸⁰ *DM (supra)* at §21; *Freeman and Crawford* [2008] EWCA Crim 1863 at §§17-20

³⁸¹ See Chapter 11 *Bad Character of Defendant General Introduction* and *Directions Generally* above

³⁸² [2008] EWCA Crim 1863

Illustration – three counts charging a sexual offence committed against each complainant – evidence in support of count 2 independently compelling – evidence of each complainant tending to negative the defence of innocent association with the others – count 2 evidence capable of supporting a propensity to commit sexual offences against children – directions both as to cross admissibility and propensity – need to return separate verdicts

We have examined the law relating to the 3 counts in the indictment. I now want to give you some legal directions about your approach to the evidence which concerns them. Although these three incidents are separate and you must reach separate decisions about each of them, the evidence upon one count is capable of supporting the prosecution's case on the others. Let me explain.

Cross Admissibility

As you know the defendant denies any sexual impropriety towards any of the three little girls, Alison, Jade and Sophie. He says his contact with each girl was friendly but entirely innocent. The prosecution has pointed out, on the other hand, that there are similarities in the defendant's behaviour as described by each of them. The prosecution suggests to you that that is no coincidence. The fact that three little girls have made similar but otherwise unconnected complaints about the defendant's behaviour makes it more likely that each of those complaints is true. In that sense the evidence of each of the three complainants is capable of lending support to the others.

You are perfectly entitled to view the evidence in this way but let me explain what should be your approach.

Are the complaints independent of one another?

First, the prosecution's point only has force if the complaints made are truly independent of one another. If one witness has influenced another, either deliberately or unconsciously, to make complaints about the defendant, then it would not be surprising that they went on to make those complaints. In that event not only would the prosecution argument fall away but it might also cast doubt upon the reliability of the accusations they make as a whole.

Let us then consider the evidence. These three girls all attend the same junior school. Two of them, Alison and Jade, are in the same class but Sophie is two years below them. None of them is a friend of the other. The families are not known to one another. None of them knew that the others were known to the defendant. Detective Constable Price has explained how each girl came to be seen by her and interviewed on video. She described the care taken to ensure that each interview was conducted independently of the others. On the face of it, then, these accusations against the defendant appear to be entirely separate and none has been influenced or contaminated by another. Counsel for the defendant submits: that may be how it looks, but how can we be sure that there has not been some deliberate or unconscious contamination of the evidence?

You must consider the evidence and make your own decision. If you are sure that a realistic possibility of influence, conscious or unconscious, by each girl of the others has been excluded, then you can treat the evidence of each complaint as supportive of the others in the sense I have described.

To what extent may the witnesses support each other?

Second, you need to assess the value of the evidence. If you have decided they are independent, it follows that the closer the similarities between the complaints the less likely it is that they can be explained away as coincidence. It is for you to decide the degree to which the evidence of one girl assists you to assess the evidence of the others. It may lend powerful support or it may not. You must make that judgement.

Propensity to commit sexual offences

There is another way in which the evidence supporting one count can also support the prosecution case on the others. The prosecution invites you for this purpose to concentrate solely on the evidence of Jade and her mother (count 2). Jade told you that the defendant walked her into the wood alongside the play area to look at the snowdrops. It was there that the defendant touched her indecently down the front of her trousers. Her mother Sandra told you that she was watching the play area from her kitchen window. One moment she saw Jade on the climbing frame. The next moment she thought she saw Jade entering the wood with a man. She ran as fast she could. As she entered the wood Jade was running back towards her in a distressed condition. She immediately said, "That man touched me down there" and began to cry. The defendant was walking away along another path towards the road. The prosecution submits that the evidence implicating the defendant in the count 2 offence is compelling. If you agree, if you are sure that the defendant is guilty of count 2, the prosecution submits that fact is relevant to an important matter in issue on counts 1 and 3. His guilt establishes that he has a propensity or a tendency to commit sexual offences of this type against young girls. The defendant says his contact with Alison and Sophie was innocent. Contrary to their evidence, nothing sexual occurred. The prosecution suggests that his propensity to commit sexual offences of this kind will help you to resolve the truth of the complaints by both Alison and Sophie in counts 1 and 3.

Decide count 2 first

Again, this is a perfectly proper approach to the evidence. I need to explain how you should approach it step by step. First, decide whether you are sure that the defendant is guilty of count 2.

Are you sure the propensity is proved?

If you are sure he is, ask yourselves whether that establishes, so that you are sure, that the defendant has a propensity to commit sexual offences against young girls. If so, it is for you to decide whether and to what extent that propensity helps you to resolve the question whether he is guilty also of counts 1 and 3.

Warning

When you are considering the last question remember that a propensity to commit an offence of a certain type does not of itself prove that the defendant committed such an offence on this occasion. Propensity, if proved, is only part of the evidence in the case and its importance should not be exaggerated.

Illustration – three robberies charged against D1 and D2 – some, but not compelling, evidence implicating a defendant in each one – previous conviction for burglary committed together - cumulative effect of (1) similarity of each robbery, (2) evidence implicating one or other of the defendants in each robbery, and (3) criminal association between the defendants – propensity to commit offences together - warning

Similarity of offences

D1 and D2 are charged in the indictment with three robberies. Each of the robberies was carried out by two men, one carrying a baseball bat and the other carrying a hand gun. Each robber, on each occasion, was wearing a red scarf tied behind his head to mask his face. CCTV evidence has established that one was about 6' 1" in height and the other was about 5'7". Both were of muscular build. The taller man carried the baseball bat and the shorter carried the hand gun.

Circumstantial case

The CCTV evidence does not identify either of the robbers, nor does any witness identify them. That may not be surprising given their disguise. The prosecution case is based on circumstantial evidence, the cumulative effect of which is, they submit, to identify the defendants as the robbers.

First, there was found in the home of D1 after his arrest a baseball bat which is of the same size and shape as the baseball bat captured on the CCTV film. He is of the same stature and build as the taller man with the baseball bat in each of the robberies. D2 is of the same stature and build as the shorter man carrying the hand gun in each of the robberies. The hand gun has never been found. After D2's arrest a square red scarf similar in appearance to those worn by both robbers was found in a drawer in D2's bedroom.

Second, found at the scene of the second robbery was a mobile telephone. The identity of the person holding the number of the SIM card was not registered, but stored in its memory was a telephone number against the name 'Lyn'. D2's girlfriend is called Lyn and that is her number. Also stored against the name 'Mum' was D2's mother's telephone number. If you are sure that the phone belonged to D2 it is capable of linking D2 to the second robbery.

Third, the defendants accept that they are close friends and associates. They have committed offences together on other occasions.

There is, therefore, some evidence to link D1, through his height and build and his possession of the baseball bat, to each of the robberies. There is some evidence to link D2, through his height and build and possession of a square red scarf, to each of the robberies. There is additional evidence in the form of the mobile phone to link D2 to the second robbery. You should consider the evidence which links, first, D1 and, second, D2 separately to each of the robberies.

However, the prosecution submits that the evidence derives its strength from a consideration of its cumulative effect. You are asked to look at the evidence as a whole. It is submitted that if you do, you will come to two conclusions: (1) that the three robberies were carried out by the same team of two men and (2) that those two men were the defendants. In other words, you are invited to conclude that the similarities between the robberies and the robbers in each case, and the discovery of the incriminating articles, the baseball bat, the red scarf and the mobile phone, is too unlikely a combination of events to be explained away as coincidence; the only reasonable explanation is that the defendants were the robbers in each case.

Evidence to be considered separately and in the round

I must explain how you should approach the evidence. The evidence concerning each separate robbery is relevant to your consideration of the others. You should first examine their circumstances. Do the common features of the robberies, including the CCTV evidence, lead you to the conclusion so that you are sure that this is a pattern of offending carried out by the same team of two? If not, then you must look at the case of each defendant and each robbery separately.

If, however, you are sure the three robberies were committed by the same team, you should next consider the evidence which cumulatively links these two defendants to them.

Thirdly, consider the impact, if any, of your knowledge that the defendants are close friends. Does that evidence drive you to the sure conclusion that the team which carried out the robberies comprised these two defendants?

Depending upon your conclusions, it is possible for you to find that in respect of all or any of the counts (1) both defendants are guilty, (2) both defendants are not guilty, or (3) one defendant but not the other is guilty. Bear in mind that the prosecution seeks to prove the case against each defendant by relying upon the cumulative effect of the evidence concerning both of them. If the prosecution fails to make you sure of that cumulative effect, you will have to consider whether the case against either man is undermined on any individual count. Remember that you must return a separate verdict upon each defendant in respect of each count.

Propensity to commit offences together

You have heard evidence that D1 and D2 have, on two previous occasions, been convicted of committing criminal offences together. Six months before the first robbery they committed an offence of burglary together. Between the dates of the second and third robberies they jointly assaulted V causing him actual bodily harm. You must not let that knowledge prejudice you unfairly towards them. You have heard about those convictions for one reason only. The prosecution submits that these defendants have a propensity, or tendency, to commit offences as a team. The prosecution suggests that the fact they were committing other offences together makes it more likely that they acted together to commit these robberies. I need to give you a further legal direction about this evidence.

When you are considering the cumulative effect of the circumstances, one of those circumstances is the fact that these two defendants have committed offences together on other occasions. You are entitled to take that fact into account when considering whether they acted together to commit these robberies. What you should not do is jump to any conclusions without a proper analysis of all the evidence. It does not follow that because they have acted together to commit different offences on other occasions, they must have committed the robberies together on these occasions. You must be cautious not to attach too much significance to this evidence, but, subject to that warning, it is for you to assess its weight and importance.

Having reminded you of the prosecution case and given you directions how you should approach the evidence, I shall now remind you in summary of the defendants' cases.

Sources

Archbold 13-37, 38, 63a; Blackstone F12.30

CHAPTER 13: BAD CHARACTER OF PERSON OTHER THAN A DEFENDANT

Introduction

1. Bad character, for the purpose of section 100 Criminal Justice Act 2003, is evidence of ‘misconduct’ on a different³⁸³ occasion, other than that which ‘has to do with the offence’ (section 98). Misconduct is the commission of an offence or other reprehensible behaviour (section 112). The word ‘reprehensible’ connotes culpability or blameworthiness.³⁸⁴
2. This does not, however, mean that evidence having to do with the facts of the offence cannot be adduced at all. It may be admissible at common law.³⁸⁵
3. Section 100 provides:

“Non-defendant’s bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

- (a) it is important explanatory evidence,
 - (b) it has substantial probative value in relation to a matter which—
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole,
- or
- (c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

- (a) the nature and number of the events, or other things, to which the evidence relates;
- (b) when those events or things are alleged to have happened or existed;
- (c) where—
 - (i) the evidence is evidence of a person’s misconduct, and

Footnotes

³⁸³ Not necessarily an earlier occasion – see A [2009] EWCA Crim 513, in which the bad character evidence established a disposition to commit sexual offences of a kind alleged to have been committed by him many years previously

³⁸⁴ *Renda* [2005] EWCA Crim 2826

³⁸⁵ See for example *Greenwood* [2005] 1 Cr App R 7; [2004] EWCA Crim 1388 at §§28–41

(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

- (i) the evidence is evidence of a person's misconduct,
- (ii) it is suggested that that person is also responsible for the misconduct charged, and
- (iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court."

4. Accordingly, bad character evidence of a non-defendant can only be admitted under section 100 if (1) all parties agree to its admission, or (2) it is important explanatory evidence³⁸⁶ or (3) it has substantial probative value in relation to a matter which (i) is a matter in issue in the proceedings and (ii) is of substantial importance in the context of the case as a whole³⁸⁷.
5. The credibility of an allegation made by a witness against the defendant is capable of being a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole, but the evidence of W's bad character must be of substantial probative value to the resolution of that issue if it is to be admitted.³⁸⁸
6. In order to be relevant to credibility it is not necessary that the bad character evidence demonstrates a propensity for untruthfulness.³⁸⁹
7. In assessing whether the evidence has substantial probative value the judge must consider, among any others he considers relevant, the factors identified in section 100(3).
8. Reasons must be given for the ruling.³⁹⁰

Footnotes

³⁸⁶ See section 100(2) "without it...the jury would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial."

³⁸⁷ *Goddard* [2007] EWCA Crim 266; *Garnham* [2008] EWCA Crim 266

³⁸⁸ *Weir (Yaxley-Lennon)* [2006] 1 WLR 1885; [2005] EWCA Crim 2866 at §73; *Renda (Osbourne)* [2006] 1 WLR 2948; [2005] EWCA Crim 2826 at §59. Note the consideration by the Court of Appeal (Aikens LJ) in *Scott* [2009] EWCA Crim 2457 of the issue whether false complaints of sexual misconduct constituted 'bad character' under section 98 CJA 2003 whose admission was not excluded by section 41 Youth Justice and Criminal Evidence Act 1999

³⁸⁹ See *Lawson* [2007] 1 WLR 3169; [2007] 1 Cr App R 11; [2006] EWCA Crim 2572 in the context of a similar issue arising between defendants; *Stephenson* [2006] EWCA Crim 2325. See also Chapter 11 Bad Character of the Defendant (3) Substantial Probative Value in Relation to an Important Matter in Issue between Defendants above.

³⁹⁰ Section 100(1)(b)

Directions

Save where it is alleged that the non-defendant committed the offence³⁹¹ the issue will usually be one of credibility of the evidence which implicates the defendant.

Illustration – V is the principal witness for the prosecution alleging unprovoked attack by the defendant- V has convictions – relevance to issues in the case

The principal witness in the case against the defendant was V. You heard that V has 3 previous convictions for dishonesty committed within the last 12 months. Two years ago V was convicted of assault occasioning actual bodily harm.

It is the prosecution case that the defendant made an unprovoked attack on V. The defendant's case is that it was V who was the aggressor. He aimed a punch at the defendant who acted instinctively in self defence. When assessing V's evidence you are entitled to take into account that V has convictions for dishonesty and has in the past acted aggressively towards another. V's convictions do not, of course, mean that V's evidence is untrue or that he was the aggressor on this occasion. It is for you to assess whether and to what extent his previous behaviour may assist you in assessing V's evidence and resolving the question whether the defendant did act or may have acted in self defence.

Sources

Archbold 13-11/22; Blackstone F14.1/14; Evidence of Bad Character, 2nd Ed. 2009, Professor John Spencer

Footnotes

³⁹¹ As to which see section 100(3)(d)

CHAPTER 14: HEARSAY EVIDENCE

(1) General Introduction

1. Hearsay evidence may have been admitted under any of the following provisions:

- (i) Where the parties agree to its admission (section 114(1)(c) Criminal Justice Act 2003)
- (ii) Statements by a witness who is dead, unfit, abroad, cannot be found, or in fear (sections 116 and 123 Criminal Justice Act 2003) ;
- (iii) Business documents and documents prepared for criminal investigations or proceedings (sections 117 and 123 CJA 2003);
- (iv) Statements admitted in the interests of justice (section 114(1)(d) CJA 2003);
- (v) Public documents and information admissible under the preserved common law (section 118(1)1. CJA 2003);
- (vi) Evidence of reputation as to character admissible to the extent the common law rule is preserved (section 118(1)2. CJA 2003);
- (vii) Evidence of family reputation to the extent the common law rule is preserved (section 118(1)3. CJA 2003);
- (viii) Statements admitted under the preserved common law rule of res gestae (section 118(1)4. CJA 2003);
- (ix) Statements of confession admitted under the preserved common law and statutory rules (section 118(1)5. CJA 2003, section 76 Police and Criminal Evidence Act 1984);
- (x) Statements of confession by an accused adduced by a co-accused (section 76A PACE 1984);
- (xi) Statements made by agents under the preserved common law rule (section 118(1)6. CJA 2003);
- (xii) Statements in furtherance of a common enterprise under the preserved common law (section 118(1)7. CJA 2003);
- (xiii) Statements by an expert which are dependent upon a body of expertise under the preserved rule of common law (section 118(1)8. CJA 2003);
- (xiv) As multiple hearsay (section 121 CJA 2003);
- (xv) Previous inconsistent statement of a witness (section 119(1) CJA 2003);
- (xiv) Previous inconsistent statement of a person whose hearsay statement has been admitted (section 119(2) CJA 2003);
- (xvii) Previous consistent statement of a witness admitted to rebut an allegation of fabrication (section 120(2) CJA 2003);

- (xviii) Previous statements of a witness made in a document which was used to refresh the witness' memory or was put to the witness in cross examination (section 120(3) and section 139 CJA 2003);
 - (xix) Statements of complaint by a complainant giving evidence (section 120(4) and (7) CJA 2003);
 - (xx) Statements by a witness identifying a person, object or place (section 120(4) and (5) CJA 2003);
 - (xxi) Statements made by a witness who has no recollection of the things described (section 120(4) and (6) CJA 2003).
2. The 2003 Act has reposed in the trial judge the responsibility for assessing whether hearsay evidence should be admitted. The underlying policy is that evidence from an absent witness should be received if it is probative and reliable. If the evidence is admitted, that judgement is ultimately for the jury. Accordingly, there is a responsibility upon the trial judge to provide the jury with appropriate directions, set in the factual context of the case, which will enable them to make it. The Court of Appeal has on several occasions reminded judges of the need for care in crafting directions in order to ensure that hearsay evidence is considered fairly.
 3. Hearsay evidence may also be given to challenge, or support, a witness who is present and does give evidence. The factors to be considered by the jury will therefore be different from case to case depending upon the purpose for which the evidence is being used.
 4. The emphasis to be given to the reliability and effect of hearsay evidence may, by reason of the burden and standard of proof, depend upon whether the hearsay is relied upon by the prosecution or the defence or between defendants.

(2) Witness Absent

5. The hearsay statement is given in evidence in lieu of oral evidence from the witness. Once admitted the issue for the jury is whether they can rely on the evidence as truthful and reliable. Some of the matters which they may need to consider can be borrowed from section 114(2) CJA 2003 (whether hearsay should be admitted by the judge in the interests of justice):
- (i) the circumstances in which the statement was made;
 - (ii) how reliable the maker of the statement appears to be;
 - (iii) how reliable the making of the statement (written or oral) appears to be;
 - (iv) the amount of difficulty involved in challenging the statement in the absence of cross examination of the maker of the statement;

Additional matters for the jury will include:

- (vi) when the statement was oral, the reliability of the reporter;
- (vii) the extent to which the hearsay is supported by or is consistent with other evidence;
- (viii) the scope for error or the existence of a reason to be untruthful.

Thus, the jury's attention will be drawn to the risks of:

- Insincerity
 - Faulty recollection
 - Ambiguity
 - Misperception
6. Evidence is admissible to challenge the credibility of the absent witness, including hearsay evidence of any matter which could have been put in cross examination and any previous inconsistent statements.³⁹² If such evidence is adduced it will be relevant to the jury's task.
7. When it is sought, under section 116 CJA 2003, to adduce the statement of a person not available as a witness, it is necessary that the maker of the statement (the 'relevant person'³⁹³) should be identified. When it is sought to adduce evidence in the interests of justice under section 114 the factors to be considered require some knowledge of the source of the statement.³⁹⁴
8. While section 117 (business records) does not require the source of the statement to be identified, such reliability as the hearsay statement has is derived from the regularity and repetition of business practice.

Footnotes

³⁹² Section 124 CJA 2003

³⁹³ Section 116(1)(b)

³⁹⁴ In *R v. O* [2007] EWCA Crim 738 the trial judge rightly refused leave to adduce evidence of an anonymous complaint under section 114(1)(d). Compare section 117 (business records) where the identity of the maker of the statement is not required.

9. The source of evidence admitted as *res gestae* may be unknown. The reliability of the evidence is derived from the spontaneity of the statement and the unlikelihood of calculation. The reliability and accuracy of the witness reporting the statement is, however, relevant.
10. The importance of adequate directions about the dangers inherent in hearsay evidence is demonstrated by the judgment of the Court of Appeal in *Horncastle and Others*³⁹⁵ and the landmark decision by the Supreme Court on appeal³⁹⁶ to uphold the Court of Appeal and depart from the reasoning of the ECtHR in *Al-Khawaja and Tahery v UK*³⁹⁷. The Supreme Court held that the admission of hearsay evidence under section 116 CJA 2003 was not incompatible with the defendant's Art 6 rights, even where it was the sole or decisive evidence, since the Act contained safeguards protecting the defendant's position. Those safeguards concern the admission of the evidence. Whether the trial is fair in such a case will depend, in addition, upon the ability of the jury properly to assess the reliability and probative value of the evidence. It follows that material relevant to those questions, including any identifiable weaknesses, should be placed adequately and fairly before the jury.
11. If the reason the witness is absent is fear, it will not be appropriate to disclose that fact to the jury unless the defence has introduced the issue before the jury.³⁹⁸

Directions - Witness Absent

In *Grant v The State*³⁹⁹ Lord Bingham described the requirements of a direction when a statement is given in evidence in lieu of the witness as follows:

"The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: see, for example, *Scott v The Queen*,⁴⁰⁰ ...p 1259; *Henriques v The Queen*,⁴⁰¹ ... p 247.....It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may."

Footnotes

³⁹⁵ [2009] EWCA Crim 994

³⁹⁶ [2010] 2 WLR 47

³⁹⁷ [2009] 49 EHRR 1

³⁹⁸ *Jennings and Miles* [1995] Crim LR 810 (CA), a decision under the 1988 Act

³⁹⁹ [2007] 1 AC 1; [2006] UKPC 2 at §21

⁴⁰⁰ [1989] AC 1242

⁴⁰¹ [1991] 1 WLR 242

Where the hearsay evidence is the basis for the prosecution case the importance of caution should be emphasised.⁴⁰² Where, however, the statement is relied upon by the defendant, or by one co-accused against another care will need to be taken with the terms of the direction so as adequately to reflect the burden and standard of proof.

Evidence admitted by agreement under section 114(1)(c) CJA 2003 is nonetheless hearsay and the jury should be told how they should approach and how they may make use of it.⁴⁰³

The terms of a direction should be discussed with the advocates not only when the evidence is controversial but also when hearsay is admitted by agreement, so that the judge and the parties are clear about the purposes for which it may legitimately be used.

(i) Section 116: Witness unavailable

Illustration – main witness identifying defendant – circumstances in which statement taken – record of identification procedure – inconsistencies between description at the scene and in statement – disadvantage to defendant and the jury - need for caution

At the outset of the trial I told you that you could receive evidence in various forms. One way is the reading of witness statements when there is no dispute about their contents. Although the evidence of Mr A has been read to you I must repeat and emphasise that his evidence is very much in dispute. I have permitted the evidence to be read because it is properly receivable in Mr A's absence, but the fact it has been admitted does not mean that you must accept it. The question whether Mr A's evidence is truthful and accurate is for you to decide and not for me. I need to give you directions as to how you should approach your task.

First, consider the evidence given by DC B in response to questions asked on behalf of the defendant.

You will recall that Mr A's statement was taken two days after the incident. He had been spoken to at the scene by DC B who recorded the conversation in his note book. Mr A was asked to visit the police station to make his statement. The undisputed evidence is that Mr A was interviewed at the police station. As his account emerged DC B wrote it down. That was sometimes achieved by question and answer to clear up ambiguity. When the statement was complete, Mr A was invited to read it and to confirm its accuracy, or to make any additions or alterations he wished. Some alterations were made and Mr A initialled them. He then read the declaration of truth and signed the statement which was countersigned by DC B. DC B told you that he considered the statement to be an accurate record of the account given by the witness.

In that statement Mr A described the incident. He also described the person responsible for V's injuries and the conditions under which he was able to give his description.

One week after making the first statement, Mr A returned to the police station. On that day an identification procedure was carried out. He identified the defendant as the man with the knife.

Footnotes

⁴⁰² Note the judge's obligation under section 125 to stop the case at any time after the close of the prosecution case if 'satisfied' that the hearsay evidence is unconvincing.

⁴⁰³ *Brown* [2008] EWCA Crim 369

While this is not the only evidence which tends to implicate the defendant it is, as the prosecution acknowledges, the main evidence identifying the defendant as the man who wounded V.

You have seen, in the course of the trial, several witnesses take the oath or affirm and give evidence in person. When that evidence has been disputed it has been tested by questions from the advocate for the defendant. As a result of seeing and hearing those witnesses you are better able to make an assessment of the value of the evidence. You do not have that advantage in the case of Mr A. It is not suggested that Mr A has been untruthful in any way but the defence case is that he is mistaken. Mr A could not be asked about inconsistencies between his description, at the scene, of the man with the knife and the description he gave in his statement two days later. You have not, therefore, as in the case of other witnesses, seen and heard his evidence under oath or affirmation tested in cross examination. You do not know how he might have responded and you must not speculate. This means that you have no explanation from Mr A how those inconsistencies crept into his account. You should bear these disadvantages firmly in mind when you are assessing Mr A's evidence.

The inconsistencies identified are.....It is submitted that they demonstrate, first, Mr A's capacity to make an honest mistake, and, secondly, the unreliability of his identification of the defendant. You will need to examine these inconsistencies and make a decision whether they are significant. If they are, then you must decide whether, in the absence of an explanation from Mr A, they are capable of undermining the accuracy of his identification of the defendant.

You cannot convict the defendant of the offence charged unless you are sure that Mr A's identification of the defendant was accurate. In judging that question you are entitled to consider not just the criticisms made of Mr A's evidence but all the evidence in the case. The prosecution relies on the following evidence in support of Mr A's identification of the defendant....

(ii) Section 117: Business records

Illustration – business records – Police National Computer – system of recording – issue whether defendant using an alias – anonymous hearsay report, recorded on PNC that the defendant had on a previous occasion used the alias – how the hearsay evidence is capable of supporting identification – warning as to possible mistake – multiple hearsay⁴⁰⁴

I need to explain the relevance of the print out from the Police National Computer, and your approach to it.

The issue you must decide is whether the prosecution has proved that the defendant was the man driving the car. You have heard that the person arrested at the scene by PC Jones gave his name as John Smith. He then fled the scene and the defendant was not traced until 14 days later. He said he was Roy Green, had never heard of John Smith and was not the man driving the car at the time of the accident. He disputes the identification made by PC Jones.

Footnotes

⁴⁰⁴ After *Wellington v DPP* [2007] 171 JP 497; [2007] EWHC 1061 (Admin) relevant to proof of identity of the perpetrator of similar acts alleged in other counts.

In making your judgement of the identification evidence, about which I have reminded you, you are entitled to take account of the fact that entered on the PNC was a man with this defendant's date of birth, living at the defendant's address, using the name John Smith.

The evidence is that, as a matter of routine, police officers, on contact with the public, submit information which may be of interest to other officers whose job it is to consider that information and to make relevant entries into the computer. It is no longer possible to identify who may have provided the information or the person who made the entry but the prosecution suggests that the entry could not have been made unless this defendant had used the name John Smith to a police officer other than PC Jones on some earlier occasion. Neither the reason for the report nor the occasion for the conversation which led to the report need concern you because they are of no relevance.

It was submitted on behalf of the defendant that although the machine may be infallible, all it does is store information provided by a human agency, and humans make mistakes. The address or the date of birth could have been misheard or misread. There were two people who could have made a mistake, first the officer submitting the report and, second, the officer making the entry onto the computer.

I must explain that the evidence is double hearsay, first from the person who made the report and second from the person who transferred the information to the computer. You therefore need to be particularly careful about each stage in the process of recording. Neither of these witnesses is available to give evidence. You have not, as a result, had the opportunity of assessing the reliability of the information recorded by hearing evidence under oath, tested by questions asked in cross examination.

You are, nevertheless, entitled to look at this evidence but it is for you to decide whether it is reliable. In making that judgement, you would be entitled to ask yourselves: what are the chances that both PC Jones and some other officer unknown to us should have made separate and unrelated mistakes about the man using the name John Smith; and what is the prospect that the person whose job it was to enter the information made an inaccurate record? If you are sure that the realistic possibility of mistake either in the report of the incident or in the recording of it on the computer has been excluded, you may conclude that the PNC record provides powerful evidence that the defendant had been calling himself John Smith. If, after exercising due caution, you conclude that the PNC evidence is reliable you are entitled to treat that evidence as support for the identification of the defendant made by PC Jones.

Consider the competing submissions made on behalf of the prosecution and the defence. The questions (1) what conclusions should be drawn about the accuracy of the PNC record and (2) what support, if any, the record gives to PC Jones' identification are for you to decide. Remember that you cannot convict the defendant unless you are sure that PC Jones' identification of the defendant was accurate.

(iii) Section 114(1)(d): Interests of justice - prosecution

Illustration – prosecution adduce hearsay in the interests of justice – registration number of getaway car recorded by one witness on the instructions of another – maker of the statement unknown and absent - [Note: The judge has, after careful consideration of the relevant factors in section 114(2), admitted the evidence under section 114(1)(d) although not satisfied that all reasonably practicable steps have been taken under section 116(2)(d) to find the missing person.]

An important strand of the prosecution case is that the defendant's car was used by the robbers to escape from the scene.

The defendant's car is a red Ford Mondeo. The registration number is....

Mr A is the owner of a newsagent's shop next door to the building society where the robbery occurred. He told you that a man ran into his shop and said, "Write this down, quick. They've done a robbery". He then dictated to Mr A a registration number which Mr A wrote down. You see a copy in your bundle of exhibits. That, of course, is the registration number of the defendant's Mondeo. The man who gave Mr A the number left the shop and has never since been traced. You are invited by the prosecution to infer that the unknown man, having witnessed the getaway, ran into the newsagents' shop with the registration number of the getaway car in his head and supplied that number to Mr A. Mr A told you that he wrote the number down immediately and confirmed it with the man before he left.

The words spoken by the unknown man are critical. They make the link between the robbery and the car. The unknown man is not available to give evidence and the first question you need to resolve is whether you can be sure of the inference that he had just witnessed the getaway. The defendant does not challenge this. He accepts that the only rational explanation for his behaviour is the immediate need for the getaway car to be identified and recorded.

The defendant denies that he was one of the robbers and denies that his car was anywhere near the scene of the robbery on that day. His case is that the unknown man must have made a mistake, either in observing the registration number or in recalling it to Mr A. This is an assertion which cannot be tested by questions to the unknown man under oath or affirmation. As you have seen in the course of the trial, the usual course, when evidence is disputed, is for witnesses to attend court and face questions. You are better able, by that means, to make a judgement whether their evidence is truthful and accurate. You know nothing about the unknown man except for Mr A's encounter with him. You cannot therefore make a judgement about the reliability of his observation and recollection except from the very limited information available to you. You must bear that disadvantage well in mind when considering what weight you can place on this evidence.

However, you are not required to look at it in isolation. The events at the newsagent's shop are just part of the circumstances on which the prosecution relies. You are entitled to consider any other evidence which tends to link the defendant with the robbery. Those circumstances, if you accept them, are capable of supporting the accuracy of the identification of the car made by the unknown man. It is for you to decide whether they do or not.

In the end, the question you must resolve is whether all the circumstances, as you find them to be, lead you to the sure conclusion that the defendant was one of the robbers.

(iv) Section 114(1)(d): Interests of justice - defence**Illustration – hearsay admitted on the application of the defence in the interests of justice – confession by another – possible fabrication**

The defendant is charged with causing V grievous bodily harm with intent.

The defendant's case is alibi. He says that V's identification of him is mistaken. The defendant has a brother called A, known also to V. V accepts that the brothers are facially similar but has told you he is sure it was the defendant and not A who attacked him. Following the defendant's arrest and interview under caution, the police made it known that they wanted to interview A, but A has gone to ground and his whereabouts are unknown.

You have heard evidence from Miss B who told you that at the time of the attack on V she was the defendant's girlfriend. She says that in the early hours on the day following the attack A came to her home. He said he had been in a fight and wanted her to wash his clothes. This she agreed to do. When she asked him who he had been fighting with, A told her it was V. Miss B is also the defendant's alibi witness. Both she and the defendant say that at the time the attack took place they were drinking together in a public house several miles away.

You have heard the evidence of the conversation between A and Miss B because it is relevant to the question whether V's identification of the defendant is accurate or mistaken. If Miss B told you the truth it would be strong evidence that V mistakenly identified the defendant. What purpose could A serve by pretending to Miss B that he had been in a fight with V when he had not?

However, the prosecution case is that Miss B's account has been concocted in collaboration with the defendant and A in order to provide the defendant with a false defence to the charge.

The matters on which the prosecution relies are these: (1) Miss B made no mention of the conversation when interviewed as the defendant's alibi witness. She mentioned this conversation to the defendant's solicitor for the first time on the morning she appeared to give evidence; (2) Miss B has a motive to assist the defendant. Their relationship, which began well before the attack on V, continues. She has been visiting the defendant while he has been in prison on remand every fortnight; (3) Miss B's evidence concerning A's clothing and what she did with it was contradictory and unsatisfactory; (4) The claim of the defendant and Miss B not to know of the current whereabouts of A is not to be believed. The defendant has made calls from prison to a mobile telephone registered to A; (5) V explained his ability to distinguish between the brothers by detailed reference to their facial appearance and build.

It is argued on behalf of the defendant that.....

You must consider Miss B's evidence with care. The prosecution case depends upon the accuracy of V's identification of the defendant. If you conclude that Miss B's evidence concerning her conversation with A is true or may be true then you could not also find that you were sure V had correctly identified his attacker. If, however, you are sure that Miss B was lying to you, her evidence of the conversation does nothing to undermine V's evidence of identification. If you were sure that Miss B's evidence can only be explained by dishonest collaboration with the defendant or his brother or both of them, you can, if you think it right, treat that finding as additional support for the prosecution case. But, in deciding whether it does provide that support, you should bear in mind that false evidence may be given in a misguided attempt to make a good defence look better.

(3) Witness Present

When composing directions about the effect of previous out of court statements received in evidence it is necessary to have in mind the question whether the previous statement is relied upon by the prosecution or the defence. If the effect of the previous statement would be to assist the prosecution the question, depending on the centrality of the issue, may be whether the jury is sure it is an accurate account. If the effect would be to assist a defendant the question may be whether the previous statement is or may be an accurate account.⁴⁰⁵

The out of court statement of a witness giving evidence may be admitted in the following circumstances.

(i) *Previous Inconsistent Statement*

Section 119 CJA 2003 provides:

“Inconsistent statements

- (1) If in criminal proceedings a person gives oral evidence and—
 - (a) he admits making a previous inconsistent statement, or
 - (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),

the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

- (2) If in criminal proceedings evidence of an inconsistent statement by any person is given under section 124(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.”

Thus, the statement will have been put to the witness either because the opposite party is challenging the consistency of the witness or because the witness is hostile to the party calling him.⁴⁰⁶

Directions to the jury will concern the reliability of the witness’ present and previous account, and the jury’s ability to make a judgement which account, if either, they accept.

Footnotes

⁴⁰⁵ *Billingham* [2009] EWCA Crim 19 at §68

⁴⁰⁶ Section 119(1) CJA 2003. Note that section 119 is not a gateway. The common law rules applicable to hostile witnesses remain. If the witness, having been treated as hostile, accepts the truth of the statement, section 119 is not in play (*Gibbons* [2008] EWCA Crim 1574). Cross examination directed to a discrete inconsistent passage in a witness statement does not thereby make the whole statement admissible (*Pashmfouroush* [2006] EWCA Crim 2330 at §25). Section 119(1) renders admissible the inconsistent

Illustration – statement by prosecution witness inconsistent with oral evidence

It emerged that there were inconsistencies between A's oral evidence and the statement he made two days after the incident you are considering. In some respects, A accepted that his memory at the time was fresher and therefore more likely to be accurate than it is now. In other instances, he insisted that his statement was wrong and that his present recollection was right.

A's statement was made almost 12 months ago. You may think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Where there is an inconsistency it is necessary to decide first whether it is significant. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may conclude that the underlying reliability of the account is unaffected. But what if the inconsistency is fundamental to the issue you are considering? You will be less willing to overlook it. To what extent such inconsistencies in A's account influence your judgment of his reliability is for you to decide.

The fact that on an important subject A has been inconsistent, and the inconsistency is not satisfactorily explained, may lead you to conclude that you cannot rely on A's oral evidence on that subject. However, the account given in A's statement also forms part of the evidence in the case. You are not bound to accept either account but if in any respect you conclude that his statement is accurate and his oral evidence is not, then you may act upon the statement in preference to his oral evidence.

You may think that the change between A's statement and his oral evidence is fundamental to your consideration of count 2. If you consider that A's statement is, or may have been, the accurate account and that his oral evidence is, or may have been, mistaken, it would follow that A's evidence cannot support the prosecution's case upon count 2.

Illustration – inconsistent statement of hostile witness for the prosecution

You will recall that A was an unwilling witness. When he first entered the witness box he would say nothing. Eventually he agreed that he had made a statement, which he identified. I permitted counsel to ask him questions about that statement. In it A said he had seen the incident which took place a matter of yards from where he was standing outside the public house. He saw the defendant run towards V and deliver a haymaker of a punch to the left side of V's face. V went to the ground, striking his head on the pavement with a sickening thud, and there he remained motionless. A told you in evidence that he had seen no such thing. He only made the statement because he thought that is what the police wanted to hear. I will remind you in more detail of his evidence in a moment.

A is a witness who has changed sides. He has given one account in his statement and a different account in the witness box. One approach would be to treat his evidence as completely unreliable and therefore worthless. If that is your conclusion A's evidence could be of no assistance to you. It is, however, open to you to reach a contrary view. A's statement is evidence on which you are entitled to act if, after careful consideration, you think it right to do so.

You will recall the evidence of bystanders that A went to the assistance of V. He called the emergency services on his mobile phone. As soon as the police and paramedics arrived he told them he had seen it all and gave, at the scene, the account which he later repeated in writing. If you reject A's present explanation for that statement and you are sure that, despite his present denial, A was telling the truth when he made it, then you may have regard to the statement in preference to his oral evidence.

(ii) Statement to Refresh Memory

Section 139 CJA 2003 provides:

“Use of documents to refresh memory

- (1) A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if—
 - (a) he states in his oral evidence that the document records his recollection of the matter at that earlier time, and
 - (b) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.⁴⁰⁷
- (2) Where—
 - (a) a person giving oral evidence in criminal proceedings about any matter has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at that time,
 - (b) his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence, and
 - (c) a transcript has been made of the sound recording,
 he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript.”

Section 120(3) sets the conditions under which the statement may be treated as evidence of the matters stated. It is not a gateway through which the statement is admitted. It remains for the trial judge to decide whether it should be received in evidence:

- “(3) A statement made by the witness in a document—
- (a) which is used by him to refresh his memory while giving evidence,
 - (b) on which he is cross-examined, and
 - (c) which as a consequence is received in evidence in the proceedings,
- is admissible as evidence of any matter stated of which oral evidence by him would be admissible.”

Depending upon the nature of the cross examination, directions to the jury will concern the accuracy or reliability of the witness’ account. It is not the use of the statement to refresh memory which triggers the admissibility of the matters stated (because the witness is confirming the truth of the statement) but the use of the statement in cross examination. Before the Act, statements which had been the subject of close textual examination by the defence were commonly admitted in evidence so that the jury could follow the arguments being presented on both sides, but not as evidence of the matters stated unless those matters were adopted by the witness. Section 120(3) now makes the statement admissible for that purpose if its conditions are satisfied.

Footnotes

⁴⁰⁷ In *Mangena* [2009] All ER (D) 137 Oct, on the trial of the defendant for investment fraud, all prosecution witnesses were permitted to refresh their memories under section 139, each having confirmed that an earlier statement had been made and that his memory would have been better at the time. The Court of Appeal dismissed an appeal mounted on the ground that at first each witness should have been required to attempt to give evidence without the aid of the statement.

Illustration – statement used to refresh memory – cross examination - admissibility

A was permitted to refresh his memory from a statement made a month after the incident. 12 months have since passed. When counsel for the defendant asked questions about it A declined to adopt it in full and A was taken through the relevant parts of the statement in some detail. As a result I have decided that you can only make sense of A's responses to counsel's questions if you have the statement before you.⁴⁰⁸

I will remind you of A's evidence and the differences between the statement and his oral evidence in a moment.

In these circumstances you are entitled to have regard to the contents of the statement for two purposes: first, to assess the effect of A's oral evidence and, second, you may treat the statement as part of his evidence. It follows that after careful consideration you may prefer any part of the account given in the statement or any part of A's present recollection given orally in evidence, as you think right.

I will explain when we arrive at the relevant parts of A's account how that direction may have an impact on your deliberations.

(iii) Statement to Rebut an Accusation of Fabrication

Section 120(1) and (2) of the 2003 Act provide:

"Other previous statements of witnesses

- (1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.
- (2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible."

No provision is made elsewhere in the Act to provide for the circumstances in which a witness' statements may be introduced to rebut fabrication. In common with other provisions in sections 119 and 120, section 120(2) does not provide a gateway to admissibility. It states only that if a statement has been admitted for the purpose it will be evidence of matters stated.⁴⁰⁹

Footnotes

⁴⁰⁸ Note section 122 CJA 2003:

Documents produced as exhibits

- (1) This section applies if on a trial before a judge and jury for an offence—
 - (a) a statement made in a document is admitted in evidence under section 119 or 120, and
 - (b) the document or a copy of it is produced as an exhibit.
- (2) The exhibit must not accompany the jury when they retire to consider their verdict unless—
 - (a) the court considers it appropriate, or
 - (b) all the parties to the proceedings agree that it should accompany the jury.

⁴⁰⁹ Trewin [2008] EWCA Crim 484 at §18

In *Athwal*⁴¹⁰ both the trial judge and counsel proceeded on the correct assumption that the consistent statements of a prosecution witness were admissible only if they rebutted recent fabrication under the common law and the mistaken assumption that, if admissible, they were evidence only of consistency and not of the matters stated. After a review of the hearsay provisions of the Act the Court of Appeal concluded that all statements made to rebut fabrication were governed by sections 114(1) and 120 (2). Of the need to satisfy the common law test, Scott-Baker LJ said:

“58. We add this observation. It is noticeable that section 120(2) refers to fabrication but without the temporal qualification “recent”. Again, this replicates the recommendation of the Law Commission. The omission of the qualification may be a welcome simplification. However, it is clear that the Commission did not recommend a wholesale departure from the previous approach. Indeed, it concluded that “the circumstances in which this minor exception can be used are best left alone” (Report, paragraph 10.45). On the other hand, we do not consider that the common law label of recent fabrication is to be confined within a temporal straitjacket. This case, and others before it, demonstrate that “recent” is an elastic description, the purpose of which is to assist in the identification of circumstances in which the traditional rule against self-corroboration, sometimes referred to as the rule against narrative, should not extend to the exclusion of a previous consistent statement where there is a rational and potentially cogent basis for its use as a tool for deciding where the truth lies. The mere fact that the witness has said substantially the same thing on a previous occasion will not generally be a sufficient basis to adduce the previous statement when the truthfulness of his evidence is put in issue. There must be something more – for example, the absence on the earlier occasion of a factor, say personal dislike, which is being advanced as a possible explanation for the falsity of his evidence in court. However, when circumstances have changed in such a way, it may not matter that they changed last week, last month or last year, provided that there is a qualitative difference in circumstances, but substantial similarity between the two accounts. There is no margin in the length of time. The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence.”

Directions to the jury will concern the question whether the statement rebuts the suggestion that the evidence is fabricated.

Footnotes

⁴¹⁰ [2009] EWCA Crim 789

Illustration – accusation of recent fabrication – earlier anonymous statement admitted to rebut recent fabrication – statement relevant to rebut accusation of improper motive and as to the truth of the matters stated

It was suggested to A in cross examination that his evidence is a tissue of lies designed to secure a substantial financial reward offered by X Bank plc three weeks after the robbery. That implies that before the reward was made public A had no evidence implicating the defendant to give. A told you that one week after the robbery he telephoned the Crimewatch programme and gave information about the robbery. He said he recognised the man in the CCTV film as the defendant. Furthermore, the defendant had asked him to mind a holdall. Inside was a hand gun. The defendant collected it 2 days later. A was not prepared to give his name to Crimewatch but said he was giving the information because he was disgusted at the treatment meted out to the security guard. It has since been confirmed that a man did indeed telephone Crimewatch and gave precisely this information. Because the anonymous caller could not be traced and the defendant could not be found the appeal was repeated, this time with a reward offered. Following the publication of the reward A informed the police of the defendant's likely whereabouts and the defendant was arrested.

You have heard about the anonymous call because it is relevant to the question whether A's evidence is true or false. Provided that you are sure that it was A who made the call you may, if you think it right, treat that evidence as an effective rebuttal by A of the accusation made against him of fabrication for his own purposes. Furthermore, as long as you are sure A was caller, the information he gave, which is consistent with his account to you, is evidence in the case. You may take it into consideration when deciding whether the fact that A eventually came forward to claim the reward and give evidence does anything to undermine the truth of what he says.

(iv) Statement Admissible as Evidence of Person, Object or Place

Section 120(4) and (5) provide:

“(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—

- (a) any of the following three conditions is satisfied, and
- (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5) The first condition is that the statement identifies or describes a person, object or place.”

Directions to the jury will concern the reliability of the witness' earliest recollection of the person, object or place.

Illustration – statement by prosecution witness concerning the description of a person

This incident occurred two years ago. At the time of the initial police investigation A was interviewed and gave a statement in which he described the facial features and build of, and the clothing worn by, the attacker. A was interviewed by an artist expert in producing pictorial impressions of features described to him. An impression was produced, a copy of which is now in your bundle. A confirmed the likeness. It is submitted by the prosecution that both the description and the impression bear a close resemblance to this defendant.

It would be unreasonable to expect A to recall the details of his description two years after the event. A trial is not a memory test for witnesses. You are entitled to and should judge the accuracy and reliability of A's recollection at the time when he was first asked to bring these matters to mind. That is why the description contained in A's statement was read as his evidence.

(v) Statement of Matters Now Forgotten

Sections 120(4) and (6) provide:

(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—

(a) any of the following three conditions is satisfied, and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5)....

(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings."

Thus, where the witness gives oral evidence that he made the statement and his statement is true to the best of his belief, the statement is admissible in proof of the matters stated if (1) the statement was made when matters were fresh in the witness' memory, (2) the witness can no longer remember them, and (3) the witness cannot reasonably be expected to remember them well enough to give evidence about them.

Directions to the jury will concern the reliability of the witness' earliest recollection of the subject matter of his evidence.

Illustration – statement of matters now forgotten – accounts manager – examined many documents in course of investigation – results recorded – since forgotten – statement admitted in evidence

Two years ago A worked in the accounts department of X Ltd as an invoice processing manager. During the course of the police investigation she was asked to examine a series of purchase orders, job sheets and invoices, the purpose being to ascertain whether the company's internal records indicated that the work invoiced was actually performed. She prepared a table on an excel spreadsheet in which the results of her researches are laid out.

A has moved on, has changed her employment and no longer has any worthwhile recollection of the exercise. It would be unreasonable to expect A now to give evidence from memory about these matters, which is why she worked through the spreadsheet with the assistance of her witness statement. It would be artificial to say that this was a process of memory refreshing. A relied almost entirely on the work she did at the time. That should not concern you. A's statement describing what she did and explaining the results of the exercise is evidence in the case which you can consider together with her oral evidence.

During cross examination on behalf of the defendant A was asked whether some of the original documents could bear an interpretation different from that reached by A at the time of the exercise. A thought not but she was unable from memory always to justify her conclusion. You will need to bear that limitation well in mind when considering the question whether some or all of these invoices were submitted for work which had never been done.

(vi) Statement of Complaint

Section 120(4), (7) and (8) provide:

“(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—

- (a) any of the following three conditions is satisfied, and
- (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5)....

(6)....

(7) The third condition is that—

- (a) the witness claims to be a person against whom an offence has been committed,
- (b) the offence is one to which the proceedings relate,
- (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
- (d) *[the complaint was made as soon as could reasonably be expected after the alleged conduct]*,⁴¹¹

Footnotes

⁴¹¹ Bracketed words removed by section 112 Coroners and Justice Act 2009 as from 1 February 2010 (Coroners and Justice Act (Commencement No 3 and Transitional Provisions) Order 2010 (SI 2010/No.145))

- (e) the complaint was not made as a result of a threat or a promise, and
- (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

(8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.”

The statement of complaint need not have been made in writing. It follows that if the prosecution is in possession of a witness statement made by a third party (e.g. relative, friend or police officer) to the effect that a complaint was made by the complainant, evidence of the terms of that complaint from the person to whom the complaint was made is also admissible either in support of the complainant’s evidence or to demonstrate inconsistency.

The removal of the requirement that the complaint should have been made “as soon as could reasonably be expected after the alleged conduct” may have the effect of increasing the scope for argument between the prosecution and the defendant as to whether the complaint, when made, supports or is inconsistent with its truth. Since the complaint need not have been made within a reasonable time, later complaints are also admissible, subject to section 78 fairness.

The judge will need to take care in his directions to the jury. They will concern matters relevant to the reliability of the witness’ complaint derived from its context, circumstances and consistency, and the explanation for any delay in making it.

The jury must be reminded that a complaint cannot provide independent support because the source remains the witness.⁴¹²

Illustration – complaint of sexual offence – delay – reasons given – whether complaint made as soon as could reasonably be expected – complaint and oral evidence from the same source

It is seldom the case that the first time a victim complains is when he or she makes a statement to the police. The complaint may be made immediately to a member of the family or a friend or a neighbour, or to the person who first comes to the victim’s assistance. Sometimes a complaint is not made for years. There was a delay here and the defendant suggests that is a reason for doubting that Ann is telling the truth.

How people react to crime may depend upon the nature of the crime, the age and personality of the victim and the environment in which the victim is living. Experience tells us that circumstances are always different and that there is no classic response to sexual crime.

Ann was living at home with her mother and the defendant, her stepfather. She was aged 11. Her evidence is that the first time she mentioned a sexual assault was to her school friend, Justine, three months later. Justine reported Ann’s complaint to their form mistress at school, Miss Jacques. Miss Jacques spoke to Ann and the police were called. During her video interview, which you have seen, Ann was asked why she had

Footnotes

⁴¹² A(A) [2007] EWCA Crim 1779 at §16 statement for the truth of the matter stated notwithstanding the witness disowns it.

not complained immediately. She said the defendant had told her that it was “our little secret” and that she should not tell anyone because “we would both be in trouble with your mother”. Do you accept that these words were spoken by the defendant? If so, does it seem to you the kind of response which an 11 year old girl in Ann’s situation might make if placed under this kind of pressure by a person having parental authority over her? Was there an implied threat that Ann would be identified with the guilt of the defendant? Your answer to these questions may affect your view whether there is a satisfactory explanation for the delay in Ann’s complaint and her evidence generally.

I will remind you of the evidence of Ann’s initial complaint in more detail in a moment but first I should explain how you may use it. The complaint is an integral part of the narrative. You would want to know how these matters first came to light. The circumstances in which the complaint was made, and the terms in which it was expressed, may assist you to a conclusion not just whether the complaint was consistent but also whether it was true. The evidence of Justine and Miss Jacques provides independent support for the fact that a complaint was made and the terms in which it was made, but remember that on each occasion the source of the complaint was Ann herself. They cannot confirm that what Ann was telling them was true. In the end you are deciding whether Ann has given a truthful account of the defendant’s behaviour towards her.

Illustration – accusation against complainant of an ulterior motive for his complaint – evidence of contemporaneous statement of complaint admitted to rebut recent fabrication – statement admissible for matters stated – application of section 120(2) and (4) – complaint and oral evidence from the same source

It was suggested to V that he chose to make these allegations against the defendant only after he became aware of the inquiry into the children’s home and in order to support a claim for compensation. It is implicit in this suggestion that V has fabricated an account of physical abuse against the defendant for his own advantage.

You have heard that while still resident at the school V stayed with his mother for a week’s holiday. He made a complaint about his treatment and a social worker was called. V gave a description which was recorded by the social worker. For reasons which remain obscure nothing then came of V’s complaint. It was not until last year that the police contacted V when he made a witness statement.

You may use the evidence of V’s complaint to his mother and the social worker, now confirmed by the record made at the time, for three purposes: first, it may assist you to a conclusion whether the accusation made against V has been undermined by the evidence that he made a complaint shortly after the events you are considering; second, it may help you to judge whether V has been consistent in his complaint and on that account whether his evidence is likely to be reliable; third, you may treat the complaint itself as part of V’s evidence as to what happened to him.

These are matters for your consideration and judgement. Whether they assist you and to what extent are both questions for you to decide. Remember, however, that in each case the source of the complaint was V. This is not confirmation of the truth of V’s evidence from another witness.

(4) Statements in Furtherance of a Common Enterprise

The common law rule concerning the admission of statements made in furtherance of a common enterprise are preserved by section 118(1)7. of the 2003 Act.

Acts done and statements uttered in furtherance of a common criminal enterprise are admissible to prove the participation of a defendant not then present.⁴¹³

Before admitting the evidence the judge must be satisfied that there is evidence that the defendant participated in the enterprise. That evidence may include the act or statement in question provided there is some other evidence (e.g. circumstantial evidence) that the defendant participated.⁴¹⁴

If it turns out that there is in fact no reasonable evidence of participation by the defendant other than the act or statement of a joint participant, the case should be withdrawn from the jury.

Directions to the jury should explain that the potency of the evidence derives from its character as the enterprise in action. The jury should not, therefore, rely solely upon the hearsay evidence.⁴¹⁵

Illustration – statements in furtherance of a common enterprise to import controlled drugs – notebook recording transactions – conversations between conspirators

As I have explained, the prosecution case against the defendants is circumstantial. It comprises in the main (1) evidence of surveillance of the defendants and their meetings, (2) journeys made, the prosecution asserts, to collect and deliver class A drugs and (3) telephone communication between the defendants at critical stages of the events observed. All four men were arrested, the prosecution suggest red-handed, at the warehouse where the final delivery of drugs was stored. They each deny they had any connection with the drugs. D1 and D2 say they were waiting for a delivery of cigarettes. D3 and D4 say they were asked by D2 to go to the warehouse to discuss a business proposition.

There are two pieces of evidence which fall outside the categories I have mentioned. I need to give you specific directions about them.

The first concerns the notebook found at the home of D1. That notebook, the prosecution asserts, is an account book of the conspiracy in operation. You have seen entries of figures against names which the prosecution says are a record of purchases made and prices paid by D3 and D4 for Class A drugs during the period of the alleged conspiracy.

Footnotes

⁴¹³ *Donat* 82 Cr App R 179; *Gray and Liggins* [1995] 2 Cr App R 100; *Devonport and Pirano* [1996] 1 Cr App R 221; *Jones and Barham* [1997] 2 Cr App R 119, [1996] EWCA Crim 58; *Smart and Beard* [2002] EWCA Crim 772

⁴¹⁴ "It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another. In particular, the judge must be satisfied that the act or declaration (i) was made by a conspirator, (ii) that it was reasonably open to the interpretation that it was made in the furtherance of the alleged agreement and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other party was a party to the agreement." Statement of the law in *Archbold* (2002)33-60c (2009 ed. 33-68) approved by the Court in *Smart and Beard* at §8. See also *Jones and Barham* at page 127

⁴¹⁵ *Jones and Barham* at pages 132-134

The second concerns the covert recording of a conversation between D1 and D2 at a meeting held in D2's car at the dockside. During the course of that conversation both D1 and D2 are discussing whether the time is now right to make a call to D3 and D4 to enter the dock. Depending upon your view, D1 is saying that the trawler is about to dock. That conversation, the prosecution says, was the conspiracy in operation. It explains what appear to be a collection by D3 and D4 made shortly after the holdalls were unloaded from the trawler into the warehouse.

The notebook is evidence in the case of D1 and the conversation is evidence in the cases of D1 and D2. I need to explain the relevance of the notebook to the cases of D2, D3 and D4 and the relevance of the recorded conversation to the cases of D3 and D4.

Acts done and statements made in furtherance of a common criminal enterprise are receivable in evidence not just against those immediately responsible for them. They are also receivable as evidence in the cases of any other participants in the enterprise. You are entitled to have regard to those acts and statements, together with the other evidence in the case, when deciding whether D3 and D4 joined a conspiracy to import class A drugs.

You need to take care with this evidence and I will explain why.

First, the notebook: The prosecution case is that if you link the entries in the notebook with the other evidence of movements by D3 and D4 and their communications with D1 and D2 they demonstrate that D1 was keeping a running record for himself and D2 both of the importations, and the contributions made by D3 and D4 to their cost.

The account book, as it has been called, was not prepared by D2, D3 or D4. It was a record kept by D1 over which they had no control. They say they cannot assist as to the purpose of the book. All they can say is that it cannot have recorded drug transactions with them because no drug transaction took place. D1 has given evidence that he kept the account to record sales of cigarettes to persons other than D3 and D4. If that explanation is true or may be true then the book cannot be regarded as evidence concerning D2, D3 and D4.

Second, the dockside conversation: D3 and D4 were not present during the recorded conversation. They could not therefore challenge what was being said. They say they know nothing about any plan to hand over drugs to them and no such handover in fact occurred.

You should guard against the temptation to look at the account book or the conversation or both in isolation from the other circumstantial evidence. In deciding whether D2, D3 and D4 were members of the conspiracy to supply drugs you should have regard to all the evidence. But, you could not convict either D3 or D4 if the sole basis for your decision was the account book or the conversation or both. You can only convict D3 or D4 if all the circumstances, including the account book and the conversation, make you sure of guilt.

(5) Res Gestae⁴¹⁶

Illustration – res gestae – statement made by an unidentified bystander – care to be taken that the words spoken were spontaneous and not motivated by malice – limited significance of the hearsay statement

V gave evidence that as soon as he heard the glass in the windscreen of his car smashing he opened his front door. A group of three youths was running away down the road. A man standing on the opposite pavement shouted over to him "It was the white beanie hat". V went inside and telephoned the police. When he returned to the doorstep about a minute later the man opposite had gone and he has never been identified or traced.

V ran down the road and found a group three youths hanging about outside the off licence at the end of the street. One of them, the defendant, was wearing a white beanie hat. V asked the defendant whether anyone else had passed by and he said 'No'. A minute or so later the police arrived. V related what had happened and the defendant was arrested.

You are entitled to have regard to this limited evidence of identification by the unknown man but I need to explain how you should approach it.

A spontaneous and unrehearsed reaction by a bystander to sudden and unexpected events can be valuable evidence of the truth of his observation. You need first to consider whether the statement he made was indeed spontaneous. You must be sure that the statement made was not motivated by malice. We know nothing about the bystander. However, given its proximity in time to the sound of smashing glass, you may think that the bystander must have been referring to an incident which he had just observed. There is, therefore, reason to think that the bystander was identifying a person he believed had just smashed V's windscreen, someone wearing a white beanie hat. It is not suggested that he was able to or did identify any particular individual. It is therefore difficult to see what scope there might have been for the bystander to give deliberately incorrect information. It is for you to decide whether you can be sure this is the correct conclusion. If not, you must put this evidence to one side and ignore it.

But what if you do conclude that this remark was spontaneous and genuine? This does not, of itself, amount to evidence of identification of the defendant. It is simply the description of an item of clothing which happens to have been worn by the defendant and neither of his two companions. What gives the evidence significance are the facts that the defendant was moments later seen a short distance away wearing such a hat, and that he denied that anyone else had recently passed by. You are invited to infer that the only candidate for the youth in the white beanie hat was the defendant. Provided you can be sure there is no room for mistake this is a legitimate approach to the evidence.

You must consider whether you can be sure of this inference. You are not, of course, expected to view this evidence in isolation. I shall summarise in a moment the other evidence upon which the prosecution relies.

Footnotes

⁴¹⁶ See *Andrews* [1987] AC 281; [1987] 84 Cr App R 382 per Lord Ackner: "Of course, having ruled the statement admissible the judge must....make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further where there are special features that bear on the possibility of mistake then the juries' attention must be invited those matters."

(6) Multiple Hearsay

Section 121 of the 2003 Act provides:

“Additional requirement for admissibility of multiple hearsay

- (1) A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless—
 - (a) either of the statements is admissible under section 117, 119 or 120,
 - (b) all parties to the proceedings so agree, or
 - (c) the court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose.
- (2) In this section “hearsay statement” means a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it.”

In *Musone*⁴¹⁷ the deceased prisoner made a dying declaration identifying his assailant. The declaration was heard by two fellow prisoners, one of whom (B) was called to give the hearsay evidence under section 116(1) and (2) CJA 2003 (witness dead). The second (P) completed a questionnaire during the investigation which followed immediately. In it P: (1) gave a circumstantial account of the incident and (2) related the words used by the deceased, identifying his attacker. P refused to give evidence. The prosecution applied successfully to adduce (1) under section 114(1)(d), P’s circumstantial account and (2) under section 121(1)(c), P’s multiple hearsay evidence account of the dying declaration. The Court of Appeal held that the evidence was properly admitted. In applying section 121(1)(c) to the dying declaration the trial judge had rightly applied the interests of justice factors set out at section 114(2).⁴¹⁸

In *Xhabri*⁴¹⁹ the defendant was charged with offences involving the kidnapping, rape and forced prostitution of a 17 year old Latvian girl. His defence was consent. During her alleged detention V managed to pass messages to family and friends. Two friends relayed the complaints to a police officer. The complaints qualified as admissible hearsay under section 120(4) and (7) CJA 2003. In the absence of the two friends the police officer’s evidence was admissible as multiple hearsay under section 121(1)(c).

In *Maher v. DPP*⁴²⁰ a witness saw the defendant collide with V’s unattended vehicle in a car park. He wrote down the number of the defendant’s car on a piece of paper which he left on V’s windscreen. V found the paper and read the number over the telephone to the police. The number was entered in the Police Incident Log by a clerk. At trial, in the absence of the written note and of the witness the Police Incident Log was admitted. The Log could not be admitted under section 117 because the information was not relayed from the witness to V in the course of a trade or business (see section 117(2)(c)). However, the evidence was admissible as multiple hearsay under sections 114(1)(c) and (2) and section 121(1)(c) CJA 2003.

It follows that both in considering the admissibility of the evidence and in composing directions to the jury the judge is required to analyse the chain of hearsay.⁴²¹ The jury will need to receive directions about each link in the chain, since the ultimate decision as to the reliability of the evidence must be made by the jury.

Footnotes

⁴¹⁷ [2007] EWCA Crim 1237

⁴¹⁸ At §15-30

⁴¹⁹ [2006] 1 Cr App R 26, [2005] EWCA Crim 3135

⁴²⁰ [2006] EWHC 1271 (Admin)

⁴²¹ *Walker* [2007] EWCA Crim 1698

Illustration – hearsay - witness 1 writes down number of car, and hands it to witness 2 saying it was the getaway car – witness 2 telephones the police, reads the note and relays witness 1's message to witness 3 – witness 3 makes entry in police incident book

You will recall the sequence of events which led to an entry being made in the Police Incident Log. The telephone operator at the police station told you that he received a call from a member of the public. The caller said that a robbery had taken place that day at the local petrol station. He said he had been handed a note by someone else at the scene who said he had written down the number of the getaway car as it was leaving. The caller read it out to the operator. The operator himself made a note and used that note to make an entry in the Police Incident Log which included the registration number read to him over the phone. None of the witnesses is now available. A transcript of recording of the telephone conversation has been agreed and the incident log has been produced by the station inspector who has explained its contents.

The prosecution relies on this evidence to prove that the car which was involved in the robbery was the defendant's car.

You will need to assess the reliability of this evidence and to do that you will need to examine each stage in the relay of information. Let us call the person who wrote the number down, A, and the person who received the note, B. There are four stages:

- (1) The observation of the car by A and the writing down of the number;
- (2) The conversation between A and B and the handing of the note to B;
- (3) The conversation between B and the operator and, in particular, the reading of the note by B to the operator;
- (4) The recording of the conversation and the number in the Incident Log.

What evidence is there that A wrote down the number of the getaway car? The evidence comes from B who informed the operator that is what A told him. This is second hand or hearsay evidence, and as the information has passed through two absent witnesses it is double hearsay. Before you could rely on it you would need to be satisfied that A accurately related to B what he had done, and that B accurately related to the operator what he had been told by A. In the end the value of the evidence depends upon the accuracy of A's recording of the number.

Had A and B been available to give evidence their accounts could have been tested by questions asked on behalf of the defendant. You do not have that advantage and you must bear in mind the possibility of undetectable error. On the other hand, you are not required to consider the hearsay evidence in isolation. There is other evidence which the prosecution submits links the defendant to the robbery. If you accept that submission then you are entitled to bear the other evidence in mind when making your assessment whether there really is room for coincidental mistake.

Sources

Definition of Hearsay

Archbold 11-4/14; Blackstone F15.1/17

Unavailable Witnesses

Archbold 11-15/25; Blackstone F16.3/12

Business etc Documents

Archbold 11-26/31; Blackstone F16.13/19

Interests of Justice

Archbold 11-3c; 11-23; Blackstone F16.20/21

Public Documents and information

Archbold 9-2/78; Blackstone F16.22/26

Expert Evidence

Archbold 11-47/48; Blackstone F.16.19, 44

Res Gestae, Contemporaneous Feelings and Intention

Archbold 11-74/83; Blackstone F16.28/37

Common Law and Statutory Confessions and Admissions

Archbold 11-84, 15-350/412, 15-354/412; Blackstone F16.38/39

Confession of Co-Accused

Archbold 11-49; 15-353a, 386, 354; Blackstone F17.19

Statements in Furtherance of a Common Enterprise

Archbold 33-65/70; Blackstone F16.40/43

Previous Inconsistent Statements and Hostile Witnesses

Archbold 11-33/35; Blackstone F6.28/35

Previous Consistent Statements

Archbold 11-33/34; 11-36/40; Blackstone F6.20/26

Multiple Hearsay

Archbold 11-41; Blackstone F16-54

See also "Hearsay Provisions in the Criminal Justice Act 2003" Professor David Ormerod, JSB Training Website; Hearsay Evidence in Criminal Proceedings 2008, Professor John Spencer

CHAPTER 15: THE DEFENDANT'S STATEMENTS AND BEHAVIOUR

(1) Confessions

Introduction

A confession, for the purposes of PACE 1984, is "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or not".⁴²²

Statements which contain mixed admissions and exculpatory assertions are frequently adduced as part of the prosecution case. The classic statement of the effect of such statements, since approved by the House of Lords in *Sharp*⁴²³, was made by Lord Lane CJ in *Duncan*⁴²⁴:

"Where a mixed statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

While *Duncan* concerned a defendant who had not given evidence, the principle that the whole statement is admissible as evidence of the truth of the matters stated applies whether the defendant gives evidence or not. In *Hamand*⁴²⁵ the Court of Appeal held that the exculpatory parts of a mixed statement were capable of discharging an evidential burden on the defendant (e.g. to raise the issue of self defence or provocation).

The grounds for exclusion of a confession are:

- (1) Under section 76 Police and Criminal Evidence Act 1984, that the confession was obtained by oppression, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof; and
- (2) Under section 78 PACE 1984, that having regard to all the circumstances, including the circumstances in which the evidence was obtained (e.g. in breach of Code C), the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Footnotes

⁴²² Section 82(1) Police and Criminal Evidence Act 1984

⁴²³ [1988] 1 WLR 7

⁴²⁴ [1981] 73 Cr App R 359 at page 365

⁴²⁵ [1985] 82 Cr App R 65

When the judge has heard and rejected an application to exclude the confession under either section 76 or section 78, the defendant is not precluded from raising before the jury matters relevant to their consideration of the reliability and truth of the confession.⁴²⁶

Directions

In *Mushtaq*⁴²⁷ the defendant unsuccessfully sought to exclude his statements of admission on the ground of oppression. Before the jury, questions were asked of police witnesses whose object was to elicit evidence of oppression, which, as in the *voir dire*, was denied. The trial judge directed the jury that even if they thought the confession was or may have been obtained by oppression they could act upon the confession if they were sure it was true. The House of Lords held this to be a misdirection.

- Juries should be directed that if they think the confession was or may have been obtained by oppression, they should put it aside and place no reliance upon it.⁴²⁸
- Where breaches of Code C capable of affecting the reliability of admissions are explored before the jury, the judge should explain their relevance since they may affect the weight which the jury can attach to the evidence.⁴²⁹
- Where the confession of a defendant who is mentally handicapped was not made in the presence of an independent person but is nevertheless admitted in evidence, and the case against the defendant depends wholly or substantially on the evidence of confession, “the court shall warn the jury that [for these reasons] there is a special need for caution before convicting the accused in reliance on the confession”.⁴³⁰
- Any evidence which is reasonably capable of undermining the reliability of a confession should be pointed out to the jury.

For the permitted use of an inadmissible confession see Archbold 15-352 and Blackstone 17-53. The question may legitimately be posed whether, if in the course of a confession obtained by oppression the accused reveals information only the culprit could have known, his guilty knowledge is admissible while the confession is not.

Footnotes

⁴²⁶ *Murray* [1951] KB 391 at page 393, [1950] 34 Cr App R 203 at page 208; *Chan Wei Keung* [1967] 51 Cr App R 257 at page 265; *Mustaq* [2005] 1 WLR 1513, [2005] 2 Cr App R 485 at page 500, [2005] UKHL 25 at §37

⁴²⁷ [2005] 1 WLR 1513, [2005] 2 Cr App R 485, [2005] UKHL 25

⁴²⁸ The policy of the Act is not just to exclude unreliable confessions but also to exclude confessions obtained by improper pressure and in breach of the right against self-incrimination, *Mushtaq* §§45-47, per Lord Rodger. The conviction was upheld because there was in fact before the jury no evidence of oppression or other improper conduct.

⁴²⁹ As in the case of Code D: *Quinn* [1995] 1 Cr App R 480; *Graham* [1994] Crim LR 212; *Forbes* [2001] 1 AC 473 (HL)

⁴³⁰ Section 77 PACE 1984

Illustration – confession to a drinking acquaintance, the making of which is denied

The prosecution case is that the defendant admitted this offence to A while they were drinking together. The circumstances were these....

The defendant denies that this conversation took place. He claims that A has fabricated his evidence for some unknown purpose of his own.

You should consider A's evidence with care.

If you are sure that the defendant made these admissions to A, then they represent important evidence in support of the prosecution case. If you are left in doubt whether the admissions were made to A then they can be of no assistance to the prosecution and you must ignore them.

Illustration – confession in interview under caution, the truth of which is denied

The defendant accepts that during his interview under caution with the police he admitted this offence. You have a transcript and can see for yourselves the detail of his confession and the manner in which it emerged.

However, the defendant has given evidence that the admissions he made were untrue. He made them, he says, because he was told by the police before the tape recorder was switched on that unless he made these admissions they would arrest his wife too.

You should first consider the evidence of the interviewing officers and the defendant. If you conclude that the threat alleged was made or may have been made to the defendant it would have been quite improper. You could not rely upon a confession whose reliability is put in doubt by such a threat. In that event you must put the interview to one side and place no reliance upon it.

It has been submitted on the defendant's behalf that even if you are sure that no threat was made, it does not necessarily follow that the admissions are true. The defendant may have had a genuine fear that his wife might be implicated by the police; he might have decided to make a false confession in order to avoid the risk that his wife would be arrested. You should consider this argument. If you conclude that the defendant's state of mind may have caused him to make admissions which are unreliable then you should place no reliance upon them. There is as a matter of fact no evidence to support the defence argument. Nevertheless, you can only act upon a confession which you are sure is true. In deciding whether the defendant made a true confession, you are entitled to have regard to the other evidence in the case. The prosecution submits that the truth of several of the detailed admissions made by the defendant has since been confirmed.

Illustration – mixed admissions and exculpatory statements in interview – defendant does not give evidence

I will explain to you in more detail in a moment the possible consequences of the defendant's decision not to give evidence. The defendant admitted in interview delivering blows to V's face and head. He claimed that he did so because he believed he was about to be assaulted by V. What then is the status of the account he gave in interview?

The whole contents of the defendant's interview are admissible as evidence, both the admissions and the explanation. You may conclude that the defendant was unlikely to confess to using violence towards V unless that confession was true. As to the explanation or excuse for using such violence, you will appreciate that the defendant was not giving evidence under oath, has decided not to support it in oral evidence, and has not had his account tested in cross-examination. On the other hand, V has given evidence and his account has been examined in detail on behalf of the defendant. The value to be placed on any part of the evidence, including the defendant's interview, is a matter for you to decide.

Illustration – breaches of Code C – caution not repeated – failure to show note of conversation to the defendant as soon as practicable – assessing significance

You have heard that the defendant was driven in a police car some 30 miles to X police station. The defendant had at the commencement of the journey been cautioned that it was his right to remain silent but if when interviewed he failed to mention something on which he later relied in court, it could harm his defence.

DC B drove the car. DC A sat with the defendant in the rear passenger seat. DC A told you that during the course of the journey the defendant made some unsolicited remarks to him about the offence which he asked the defendant to clarify. There followed, according to DC A, significant admissions. DC A said that on arrival at the police station he went to the CID office while his colleague DC B presented the defendant to the custody officer. There he wrote down a summary of the conversation which included some direct quotations of the defendant's words. The defendant was not shown that record until he had been interviewed for 2 hours. When shown the record he refused to comment.

When police officers take suspected persons into custody they are bound by a comprehensive set of rules designed to protect the interests of the suspect. DC A was admittedly in breach of those rules in two important respects. First, he failed to remind the defendant when he started to speak in the police car that he was not obliged to say anything. Second, he failed as soon as was practicable, to provide the defendant with the opportunity to read the record, comment upon its accuracy and sign it.

These failures are, depending upon your view, capable of affecting the reliability of the admissions recorded by DC A. In deciding whether you can rely upon the record, you are entitled to bear in mind the defendant's admission that there was indeed a conversation between himself and the officer during which, the defendant told you, it was his intention to elicit information from the officer. He knew that he was under no obligation to say anything if he did not wish to. If you accept the defendant's evidence that he was aware of his right to remain silent then he suffered no disadvantage from DC A's failure to remind him of that very fact.

Secondly, the crux of the dispute between the defendant and DC A is whether, during their conversation, the defendant made the admissions attributed to him. There was an admitted delay of some 4 hours between the making of the record and the presentation of it to the defendant in interview. DC A told you that this was an oversight. He had taken a meal break believing that the defendant was not to be interviewed before the arrival of the duty solicitor. As a matter of fact that was not so. The defendant had at first declined the services of a solicitor and his interview commenced within two hours of his arrival at the police station. DC A said he was then called out to another matter and the record did not come back to his mind until after he had dealt with it. The purpose of the rule that the defendant should be given the opportunity to comment on and sign the record is to protect the defendant from inaccuracies in it. The sooner any dispute about the accuracy of the record is revealed the better able you are to make an assessment whether it is reliable. Here, the defendant chose, when shown the record, to make no comment at all. If, but only if, you think it right to do so, you are entitled to conclude that the defendant in the event suffered no disadvantage. He was given a later opportunity to examine the record but chose not to reveal whether he disputed it or not. The defendant has told you that his silence did not indicate agreement. He thought he was being set up. That is the moment when he decided he needed a solicitor and, from that moment on, he refused to answer questions.

It follows that the central issue for you to resolve is whether DC A's record of these admissions is accurate or not. When deciding that issue you should bear firmly in mind the fact that the procedure designed to protect the defendant's interest was not properly followed. Nevertheless, if having taken account of the irregularity, you are sure that DC A has told the truth and that his written note is an accurate record of the defendant's words of admission, you are entitled to have regard to it when deciding whether the defendant is guilty of the offence charged.

Sources

Archbold 15-354/408, 15-14/16; Blackstone F17.1/65

(2) Lies

Introduction

The problem stated

1. If the prosecution succeeds in demonstrating (by proof or admission) that the defendant has lied about a significant matter the question is frequently posed to the jury, “Why should the defendant have lied if he is innocent?”
2. This conundrum is at the heart of all ‘lies’ directions and there are two central questions which arise:
 - If the defendant admits the lie, is his explanation for telling the lie true or false?
 - If the defendant denies that he lied, or his explanation for telling an admitted lie is false, what was his reason for lying?
3. One obvious explanation for lying when accused is that the defendant is guilty. Some people admit their guilt, others try to lie their way out of trouble. From time to time, however, defendants lie against their own best interests. The fact that the defendant is prepared to lie because he has some interest or another to serve by lying is almost certain to affect his credibility as a witness generally, since, if the defendant is prepared to lie once about something important, he may well lie about something else important.
4. The purpose of the ‘lies’ or ‘*Lucas*’ direction is simply to alert the jury to the fact that a lie told by a defendant does not, of itself, necessarily indicate (technically, is not necessarily probative of) *guilt* because he may have had some other reason for lying.

Origins

5. The issue whether the defendant’s lies amount to evidence of guilt gained prominence when the jury was required to look for corroboration, or independent support, of accomplice evidence. It was important to establish that there was no innocent reason for lying because, if there was, the lie could not support the evidence which required corroboration. The old rules requiring corroboration have now largely gone. In *Lucas*⁴³¹ the Court of Appeal (Lord Lane CJ) gave the following explanation:

“To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.”⁴³²

Footnotes

⁴³¹ [1981] QB 720, [1981] 73 Cr App R 159

⁴³² [1981] 73 Cr App R 159 at pages 162-163

Furthermore, the Court held that:

"Providing that the lies told in court fulfil the four criteria which we have set out above, we are unable to see why they should not be available for the jury to consider in just the same way as lies told out of court."⁴³³

Extension of the principle

6. In *Goodway*⁴³⁴ the defendant was charged with murder. He was identified by witnesses. Another man was present who bore a close resemblance to him. In interview the defendant denied being in proximity to the deceased. However, blood was found on his clothing. The prosecution relied on the lie to support its case that the defendant was the killer. The Court held that the jury should have received a *Lucas* direction. Lord Taylor CJ said, moreover⁴³⁵:

"In our view, there is no reason in principle or logic for drawing a distinction between corroboration and identification cases and any other case in which lies may be relied upon in support of prosecution evidence. Accordingly, we consider [counsel's] broader proposition is sound and that a *Lucas* direction should be given, save where it is otiose as indicated in *Dehar*,⁴³⁶ whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt."

Present scope of the principle

7. The Court of Appeal gave further assistance on the circumstances when a *Lucas* direction was and was not required in *Burge and Pegg*⁴³⁷. Counsel had advanced the argument that the direction was required whenever the defendant gave evidence upon a discrete issue which might be disbelieved. The argument was rejected.
8. In the straightforward case, where the prosecution witnesses give one version of events and the defendant quite another, the jury may decide that they are sure the prosecution's case is true and the defendant's case is not. If they do, it must follow that aspects of the defendant's account were untrue; but, there is, in these circumstances, no need for the judge to warn the jury against treating the defendant's lies as probative of guilt because only acceptance of the evidence for the prosecution could demonstrate that the defendant had lied, or that he had lied because he was guilty. The problem only arises when, quite apart from the strength or weakness of the prosecution evidence on the *essential issue*, the jury are invited or tempted to infer guilt from the defendant's lies about other matters.
9. In *Burge and Pegg* Kennedy LJ identified the circumstances in which a direction may be required as follows⁴³⁸:

"1. Where the defence relies on an alibi.

2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.

Footnotes

⁴³³ At page 163

⁴³⁴ [1994] 98 Cr App R 11

⁴³⁵ At page 17

⁴³⁶ [1969] NZLR 763

⁴³⁷ [1996] 1 Cr App R 193

⁴³⁸ At pages 173-174

3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

If a *Lucas* direction is given where there is no need for such a direction (as in the normal case where there is a straight conflict of evidence), it will add complexity and do more harm than good. Therefore, in our judgment, a judge would be wise always, before speeches and summing-up in circumstance number four, and perhaps also in other circumstances, to consider with counsel whether, in the instant case, such a direction is in fact required, and, if so, how it should be formulated. If the matter is dealt with in that way, this court will be very slow to interfere with the exercise of the judge's discretion. Further, the judge should, of course, be assisted by counsel in identifying cases where a direction is called for."

10. Despite the clarity of this advice it is not always a straightforward judgement whether the lie goes to the central issue between the prosecution and the defence (when a *Lucas* direction will not be appropriate) or to a collateral issue (when it may be). Compare *Lesley*⁴³⁹ and *Harron*⁴⁴⁰.

The terms of the direction

11. As to the terms of the direction Kennedy LJ said in *Burge and Pegg*⁴⁴¹:

"The direction should, if given, so far as possible, be tailored to the circumstances of the case, but it will normally be sufficient if it makes the two basic points:

1. that the lie must be admitted or proved beyond reasonable doubt, and;
2. that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons, so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case."

The trial judge's decision

12. The first question for the trial judge is whether a lies direction is required at all. In making this judgement a useful question to ask is whether the jury would, in effect, have to be sure of guilt before they could be sure that the defendant lied. If so, it is probably not a case for a lies direction because the defendant's alleged lie goes to the heart of the issue between the prosecution and the defence.
13. The way in which the prosecution deployed the alleged lie in cross examination may, but will not necessarily, provide the answer. A common technique for the prosecutor is, by utilising the evidence of his own witnesses, to challenge the defendant on details at the periphery of his case, the object being to test whether the defendant is prepared to make appropriate concessions. If he does not, there is ground for an accusation of lying, but there is not on that account alone likely to be a danger that the jury will jump to a conclusion of guilt.

Footnotes

⁴³⁹ [1996] 1 Cr App R 39

⁴⁴⁰ [1996] 2 Cr App R 457

⁴⁴¹ *Supra*

14. Where a lie told out of court is admitted and explained, whether convincingly or not, it may not be of such substance that the jury is liable to equate the lie with guilt. In *Tucker*⁴⁴² the defendant was charged with grievous bodily harm. It was alleged that with another he attacked V. His defence was that he intervened in a fight between two others and acted in self defence. He was at first evasive in interview about the identity of those involved in the incident in which he intervened. His explanation was that he did not want to get involved in the investigation. While reminding the jury of the defendant's explanation the judge said nothing about the possible significance of his lies. The prosecution argued successfully on appeal that cross examination had been directed to the defendant's general credibility and not to an inference of guilt. The court held that a full lies direction would not have been appropriate (but see paragraphs 16 and 18 below). Professor Di Birch, in her commentary upon the report in the *Criminal Law Review*, remarked:
- "There is always a thin line between guilt and credibility where untruths in an accused's account are concerned, and the direction should not depend on the precise way in which the lies are deployed by the prosecution. This does not mean that every time prosecuting counsel draws attention to some point of detail in an earlier statement which the accused now admits is untrue that the judge must embark on a *Lucas* direction."
15. If the alleged lie, while not at the heart of the issue between the prosecution and the defendant, concerns an important collateral matter, of which an alibi defence is the clearest example, the lies direction should be given. Proof that the alibi is untrue is proof that the defendant was present. Proof of presence is not, without more, proof that the defendant committed the crime, but the danger exists that without guidance the jury will assume that the motive for the lie was guilt.
16. It is suggested that the guiding test for the trial judge is whether there is a danger the jury will assume that because the defendant lied about an important matter he must be guilty. The most difficult decisions are those which are on the borderline. No injustice or unfairness is likely to be caused by giving a lies direction in such a case.
17. The trial judge may reach the conclusion that, while the test for a lies direction has been met, a direction in the particular case before him will simply serve to confuse or to deflect the jury from the real issues. Provided the jury is directed to focus on the prosecution evidence, told what limited use can be made of lies (credibility only), and warned that the lies cannot prove guilt, the mischief which the full direction seeks to avoid will be removed. The second illustration below attempts to provide an example of such a direction.
18. When the trial judge decides that a full lies direction is not appropriate it may still be necessary to say something about the allegation of lying, if only to point out what relevance it does or does not have. That was the conclusion of the court in *Tucker*⁴⁴³. The trial judge might, for example, have directed the jury that while the defendant's initial prevarication may affect their judgement of the defendant's evidence as to how he became involved, or his evidence generally, it provided no assistance on the issue whether, when he took part in the violence, he acted in self defence or not.

Footnotes

⁴⁴² [1994] Crim LR 683

⁴⁴³ *Supra*

Lies and bad character

19. In *Campbell*⁴⁴⁴ the defendant was charged with murder. He had earlier pleaded guilty to unlawful possession of firearms and ammunition found in his possession 11 days after the shooting. There was also found on a glove in his possession firearms residue. The prosecution relied on these convictions and the glove as evidence of bad character from which the jury could infer a propensity to commit firearms offences. The defendant advanced explanations which, if accepted, would remove the potential for a finding of propensity. It was argued on appeal that the trial judge should have given a lies direction. The court held that an occasion for a lies direction had not arisen. Either the jury could not exclude the defendant's explanation (in which case the defendant had not lied), or the jury would disbelieve the explanation (in which case the jury would find propensity). Since the jury would be given a propensity warning (as they had been) the defendant was adequately protected against an assumption of guilt.
20. It may not be that in all such situations both a bad character and a lies direction will be inappropriate. There *may* be a risk that the jury will find not only propensity but also that the defendant would not have lied about his bad character unless he was guilty. A lies direction in *Campbell* could simply have pointed out that the defendant had an obvious possible motive for placing an 'innocent' gloss on the bad character evidence. Even if he had lied about his access to and familiarity with unlawful firearms it did not automatically follow he was guilty of this murder.

Directions

The following represents good practice:

- Discussion with the advocates is essential both as to the question whether a *Lucas* direction is required at all and, in any event, as to the terms in which the issue of lies is to be left to the jury⁴⁴⁵.
- The lies on which the prosecution relies, or which the judge considers may be used by the jury to support an inference of guilt, should be identified for the jury.
- The jury must be sure that a deliberate lie was told either because the lie is admitted or because it is proved.
- Any explanation for the lie tendered by the defendant or advanced in argument on his behalf should be summarised for the jury.
- The jury may be told that the defendant's lie is relevant to the credibility of the defendant's account in interview and/or evidence.
- The jury should be directed that before they can treat the defendant's lie as additional support for the prosecution case they must exclude, so that they are sure, the possibility that the lie was told for an 'innocent' reason (meaning a reason other than guilt). Such directions should always be framed within the context of the facts of the case.

Footnotes

⁴⁴⁴ [2009] EWCA Crim 1076

⁴⁴⁵ *Codsi* [2009] EWCA Crim 1618 at §27

- Should the defendant advance a reason why he lied, it is not incumbent upon the judge to list others unless it is a reasonable possibility that they may arise on the facts; nor, when none is advanced, is it necessary to cover every theoretical possibility, only those which might reasonably arise on the facts.
- What weight the jury attaches to the lie is a matter for them. However, it may be necessary to ascertain whether the lie alleged is capable of supporting an adverse inference on some only, or all, of the issues between the prosecution and defence. Where, therefore, the offence charged requires specific intent and the motive for the lie could have been an attempt to avoid a charge even of the lesser offence, the jury should receive a direction to be cautious before using the lie as any support for the inference of specific intent.⁴⁴⁶
- The jury should be told that lies cannot of themselves prove guilt. They may, depending on their view, provide support for the prosecution case or a specific part of it.⁴⁴⁷
- One of the reasons why lies directions can be confusing to juries is that concepts such as 'credibility', 'consciousness or realisation of guilt', 'the defendant's lies may support an inference of guilt', and 'support for the prosecution case', are unfamiliar and capable of being misunderstood unless explained through the factual context of the case.

Appendix 1 contains former Specimen Direction 27 which has received approval in the Court of Appeal and continues to be a useful reference.

Illustration – allegation of wounding with intent – defendant admits lying in interview when claiming to have been elsewhere – defendant denies having knife in his possession – evidence that he left his home with a knife – lies direction – warning against using lies to infer specific intent

Miss A gave evidence that she saw a fight between V and Y taking place outside the pub. A man she later identified as the defendant approached. She saw the glint of something shiny in his right hand. With the same hand the defendant appeared to deliver a blow to V's stomach and V went to the ground suffering a wound to the abdomen.

The prosecution invites you to conclude that when he was interviewed under caution the defendant lied about important matters. First, he maintained throughout his first interview that he was not present at the scene of the assault on V. Secondly, the defendant said in interview, and has maintained in his evidence, that he did not take a knife to the scene of the assault on V. The prosecution has suggested to you that these lies were told in an attempt to conceal the defendant's guilt.

I need to provide you with a specific direction how you should approach evidence of alleged lies.

Footnotes

⁴⁴⁶ *Bullen* [2008] EWCA Crim 4 at §40

⁴⁴⁷ *Woodward* [2001] EWCA Crim 2051 at §24-25

The first question for you to resolve is whether the lies are proved.

The defendant admitted in interview and in evidence that he lied when claiming that he had not been present at the assault. You will not, therefore, have any difficulty in concluding that the first lie is proved.

However, the issue whether the defendant took a knife to the scene remains in dispute. B gave evidence that, before they went out that night, the defendant went to the kitchen drawer, removed a vegetable knife and placed it in his pocket. B said he asked the defendant why he had the knife. The defendant told him, "Just in case". After they had consumed a couple of pints together B went with other friends to the kebab shop, leaving the defendant at the bar. If, having considered the evidence of B and the defendant, you are sure that B told you the truth then your conclusion would be that the defendant has lied about a second important matter. If you are not sure that B told you the truth then you cannot treat the defendant's denial as a lie, and you should put the prosecution's assertion about the second lie to one side and ignore it.

You will therefore be considering the effect of at least one lie and, depending on your conclusion, two.

You will need to decide whether one or other or both of these alleged lies assists you to a conclusion whether the defendant did indeed stab V with a knife. They may assist you in two ways:

First, the fact that the defendant has lied about an important matter may affect your view of him as a witness generally. It is not bound to. That is for you to decide.

Second, it is open to you to consider whether the defendant's lies lend some support to Miss A's evidence that it was the defendant who stabbed V. That too is for you to decide.

However, you should not assume that because the defendant lied he must be guilty. Defendants may tell lies for reasons other than guilt. The defendant told you that he denied being present at the incident because he was scared that if he told the truth he would not be believed. That is an explanation which you must consider. If you think his explanation is true or may be true then his lie cannot assist the prosecution case.

The defendant continues to deny that he left the house with a knife in his pocket. If you are sure he did, you will need to consider why he has lied about that. May it have been because he was scared or for some such innocent reason? Only if you are sure that there was no innocent reason for the lie can you consider whether the defendant lied about the knife because the truth is that he inflicted the wound.

These are the questions you need to consider. What conclusions you draw from them are for you to judge. Remember that lies alone cannot prove the case against the defendant. The essential evidence for the prosecution is that of Miss A. You must be sure that her identification of the defendant as the man who stabbed V is true and accurate.

Even if you are driven to the conclusion that the defendant lied in an attempt to conceal his guilt of wounding, you may consider that his lies will be of little or no help on the issue of intent. The defendant would have had motive enough to lie about his involvement in a wounding. Could you be sure that he lied to conceal his intent as well? For this reason, when considering, if you do, the question of his intent, you should concentrate on the circumstances in which the wound was delivered as I have already summarised them.

Illustration – warning not to treat lies as additional support for the prosecution case

The defendant admittedly lied to the police in interview when he claimed that he was not present during the assault upon V. He told you that he was scared to tell the truth that he was present when someone else stabbed V because he thought he might get the blame. That is an explanation which you should consider. The prosecution case is that the defendant also lied when he denied being in possession of a knife. If you accept the evidence of B then plainly the defendant did take a knife out with him that night. If you are sure that the defendant told a deliberate lie, you are entitled to consider how, if at all, that affects your view of his evidence generally.

A lie told by a defendant, whether in interview or in evidence, is capable of affecting your judgement whether he has in other respects given truthful evidence or not. The weight you attach to the lie is a matter for you to decide. But if you think the defendant did give or may have given you an honest explanation as to why he lied, his lie would be of little or no value to you.

What you should not do is decide this case on lies. Lies cannot establish whether it was the defendant who stabbed V. You can convict the defendant only if you are sure that Miss A gave truthful and reliable evidence. In making that decision you are entitled to take account of B's evidence, if you accept it, that the defendant went out that night armed with a knife.

Sources

Archbold 4-402/402a; Blackstone F1.18/20

(3) Out of Court Statements by Another Person as Evidence For or Against the Defendant

Introduction

The Normal Rule

1. The normal rule is that an out of court statement by one defendant (made, for example, in an interview or confession) is not evidence against any other defendant. Where, however, the maker of the statement gives evidence in a joint trial, his evidence is admissible for all purposes, including in proof of guilt of other defendants.⁴⁴⁸
2. In *Hayter*⁴⁴⁹ three defendants were jointly charged with murder. The prosecution case was that A paid C to carry out the killing of her co-habitee and that B was the go-between. The evidence against C comprised his confession to his girlfriend in which he implicated B. The evidence of C's confession was not admissible against B but proof of the guilt of C was the essential starting point for the prosecution's circumstantial case against B. By a majority the House of Lords upheld the trial judge's direction to the jury that if C's confession to his girlfriend made them sure of C's guilt, they were entitled to regard C's guilt as proved when considering the case against B. Section 74 Police and Criminal Evidence Act 1984 did not apply to joint trials but proof within a joint trial of the guilt of defendant C, by admissible evidence against him, was sufficient proof of C's guilt in the case against B, notwithstanding that the evidence which proved C's guilt was not also admissible against B. This was not an abrogation of the common law rule but a statement of its limits.

Sections 114(1)(d) and 119 Criminal Justice Act 2003

3. Since the hearsay provisions of the Criminal Justice Act 2003 came into force, the out of court statement of another person, including a statement of confession, can be admissible in the interests of justice in proof of the matter stated under section 114(1)(d), whether the application is made by the prosecution or the defence.⁴⁵⁰ In *Prosecution Appeal (No 2 of 2008)*, *Y*⁴⁵¹ the Court of Appeal heard an appeal against the trial judge's ruling that the prosecution could not seek to admit against Y the out of court confession of X implicating Y. X had on an earlier occasion pleaded guilty to murder. The trial judge ruled that section 114(1)(d) did not, in consequence of the common law rules preserved by section 118, apply to third party statements of confession which implicated others. The Court of Appeal disagreed. Section 114(1)(d) applied to all forms of hearsay, whatever the vehicle in which it was delivered (unless it was a preserved common law exception under section 118 in which case it would be admissible under section 114(1)(b)), and applied whether the applicant was the prosecution or the defence. On the other hand, a *successful* application by the prosecution to prove the guilt of Y by the admission of the hearsay confession of X was another matter. Hughes LJ referred to the obstacles and concluded⁴⁵²:

Footnotes

⁴⁴⁸ *Rudd* [1948] 32 Cr App R 138; *Gunewardene* [1951] 2 KB 600, [1951] 35 Cr App R 80; *Rhodes* [1960] 44 Cr App R 23. Where in evidence one defendant implicates another, note that a *Makanjuola* warning to the jury may be required to the effect that he may have a purpose of his own to serve – see Corroboration and the need for caution

⁴⁴⁹ [2005] 2 Cr App R 3, [2005] UKHL 6

⁴⁵⁰ See also paragraph 6 below

⁴⁵¹ [2008] 2 All ER 484, [2008] EWCA Crim 10

⁴⁵² §59. Note also the considerations identified in §§49-58, 60 and 62. See also B and S [2008] EWCA Crim 365 (admissibility under section 114(1)(d) of confession of one co-accused implicating another)

"Although section 114(1)(d) is available to the Crown as it is to a defendant, the identity of the applicant is plainly relevant to the interests of justice test. It does not necessarily follow that the interests of justice will point in the same direction upon an application by the Crown as they might upon an application made by a defendant. Section 114(2)(i) moreover requires consideration of the injurious consequences of admission ('prejudice') to the party facing the evidence which will arise from the difficulty of challenging it. Since the burden of proving the case is upon the Crown and to the high criminal standard, very considerable care will need to be taken in any case in which the Crown seeks to rely upon an out-of-court statement as supplying it with a case against the defendant when otherwise it would have none. In such a case if there is genuine difficulty in the defendant challenging, and the jury evaluating, the evidence, the potential damage to the defendant from that difficulty is very large."

4. In *B and S*⁴⁵³ three schoolboys were charged with the attempted robbery of V. All were travelling on a bus. B was alleged to have demanded from V all his belongings. In interview under caution S made remarks which implicated B in the attempted robbery. At trial S, while admitting in cross examination on behalf of the prosecution that he gave those answers, claimed that he could not recall the event. The judge directed the jury that they could regard S's answers in interview as evidence in the case against B. The Court of Appeal held that the judge had failed properly to assess the admissibility of the hearsay under section 114(1)(d) or section 119 (previous inconsistent statement). However, the hearsay was plainly admissible and the judge had given an appropriate warning to the effect that S had, when interviewed, an interest of his own to serve. On the issue of admissibility, the Vice President, Latham LJ said:

"13. It is and always has been trite law that if in a trial a particular defendant adopts, in the sense of agrees to and accepts, the contents of an interview to the police, that immediately makes the contents of the interview part of his evidence. That is pure common sense; it is part of his oral evidence to the jury. But when one uses the phrase "adopting his interview", that does not mean, as the judge appears to consider here, accepting that that is what he said; it means making the contents of the interview part of his evidence, in the sense of agreeing that that is what happened.

14. What does not appear to have happened in this case was a proper appreciation of the status of the contents of the interview in the light of the provisions of the Criminal Justice Act 2003. The statements made by the appellant S in interview constitute hearsay evidence under section 114 and could be considered for admission before the jury in the context of the code contained in section 114. Further, because the appellant stated that he could not remember the events which he had talked about in interview, the contents of the interview also constituted previous inconsistent statements within the meaning of section 119 of the 2003 Act and were accordingly admissible in accordance with the provisions of that section, but subject always to the provisions of section 78 of the Police and Criminal Evidence Act and section 126 of the 2003 Act.

15. It follows that there is validity in the criticism made by Miss Ryan on behalf of this appellant as to the way in which this evidence was admitted by the judge, in particular the fact that because he did not consider the provisions of section 114, section 119, section 126, section 78 of the Police and Criminal Evidence Act he did not apply his mind to the safeguards contained within that code relating to the admissibility of, on the one hand, hearsay evidence and, on the other hand, previous inconsistent statements.

16. The question therefore arises as to what we should do about that failure by the judge to deal with the matter properly. In full submissions which have been put before us by Mr Keith as the Advocate to the

Footnotes

⁴⁵³ [2008] EWCA Crim 365

Court, for which we are extremely grateful and which, if we may say so, set out impeccably the history of the provisions with which we are concerned, he submits that the judge was clearly wrong as a matter of law in believing that the material could be admitted on the basis that he set out in his ruling. He submits that the material was clearly admissible under section 119 and also under section 114, subject to the fact that the judge neither considered section 114(2) nor the other provisions to which we have referred which provide the safety net for admissibility of what are essentially hearsay statements. He submits, however, that in the context of this case there was really only one answer if one applied those safeguards, and that was that it was appropriate to admit those statements.

17. We entirely agree. It follows that insofar as the statements were admitted on the wrong basis, that does not affect and cannot affect the safety of this conviction. Accordingly, we dismiss the appeal insofar as it is based upon that ground.”

It would be unwise to treat the decision in *B and S* as support for the proposition that S’s interview should have been admitted in the interests of justice under section 114(1)(d). No exercise of judgment upon the matters to be considered under section 114(2) was attempted by the trial judge or by the Court of Appeal. The specific occasion for the admission of the hearsay was the making of a previous inconsistent statement.

Section 76A Police and Criminal Evidence Act 1984

5. Where a confession was made by one of two or more defendants being tried in the same proceedings, section 76A Police and Criminal Evidence 1984 permits the admission of that confession on the application of another “in so far as it is relevant to any matter in issue in the proceedings” provided it is not excluded because it was obtained by oppression or things said or done likely to make the confession unreliable. In *Johnson*⁴⁵⁴ one of two co-accused had earlier entered a plea of guilty on a written basis. He was permitted to vacate the plea. At the subsequent joint trial, his co-accused was given leave to introduce in evidence the written basis. Pill LJ explained the decision thus:

“20 The Recorder decided to conduct a *voire dire* to investigate the circumstances in which the guilty plea and the written basis of plea were tendered. Both were clearly relevant to matters in issue in the case. The Recorder heard evidence from the appellant and considered the transcript of the proceedings before Judge Nicholas Jones.

21 The issue at the trial must be treated as an issue as to the admissibility of evidence. In ruling that the evidence was admissible, the Recorder clearly had in mind the provisions of Section 76A(2) of the 1984 Act. He stated that he had come to a clear conclusion that the plea and basis of plea were not on the balance of probabilities obtained by anything said or done which was likely in the circumstances existing at the time to render unreliable the plea and basis of plea. The confession was admissible at the request of the co-accused under S76A(1). The judge was not required to exercise any residual discretion he had to exclude the evidence in the interests of a fair trial. The ruling was given after the appellant had decided to give evidence.

22 We understand the frustration of a defendant who is permitted to vacate a guilty plea but not then permitted to enjoy the fruits of vacation by way of a trial unencumbered by the earlier plea. On the

Footnotes

⁴⁵⁴ [2007] 171 JP 574, [2007] EWCA Crim 1651

evidence, however, the issue at this trial was essentially between the two defendants and the decision in *Myers*⁴⁵⁵, and Section 76A of the 1989 Act, are designed to ensure a fair trial in that situation....."

6. In *Finch*⁴⁵⁶ two men travelling in a vehicle containing a firearm and ammunition were arrested and charged. D1 made a confession in which he exonerated D2. D1 pleaded guilty. At his subsequent trial D2 applied to adduce the confession of D1 in support of his defence to have been ignorant of the presence of the firearm and ammunition in the car. The application was rightly refused since D1 was not, at the time of the application, jointly charged in the same proceedings within the meaning of section 76A PACE 1984. As to the alternative application under section 114(1)(d), Hughes LJ said:

"20. The appellant made alternative application to adduce the contents of Richer's police interviews under this section. The Crown arranged for Richer to be produced at court and he was present. The judge was told that he was reluctant to give evidence. He may have had his solicitors present at court - he certainly had been represented. The judge was either shown or told about a letter which had been written by his solicitors some time beforehand and he was told that Richer declined to see Finch's representatives. The letter indicated that Richer had been advised not to give evidence because, as it was suggested, he did not wish to jeopardise his position so far as sentence was concerned and the letter said that he would refuse to answer questions on the grounds that they might incriminate him further, having already pleaded guilty. There was a reference in the letter to his having pleaded guilty on a basis. This was not a case in which any written basis for plea had been advanced, still less accepted, and had there been an assertion as to something falling short of the defence of duress but amounting to pressure to commit the offence, it is likely that there would have had to be some kind of fact-finding hearing in the case of Richer.

21. However that may be, the judge indicated that he was not satisfied with that bare assertion. After time for consideration, Miss Radcliffe declined to call Richer. The judge had plainly contemplated that Richer should be put into the witness box so that his reaction could be judged before any question arose of his out of court statements being admitted. He seems to have contemplated Richer being called for that purpose immediately before the jury. A possible alternative preliminary might have been to apply to call him into the witness box in the absence of the jury to explore his reaction and the legitimacy (if any) of his stance, but no application to do that was ever made. Instead, the appellant stood on the proposition that to call him when he was reluctant to give evidence, or (in the useful colloquial expression) blind, was something that could not be expected of him. Thus the judge had to resolve without hearing Richer the question whether the interests of justice required his out of court assertions to be adduced as hearsay.

22. The judge worked through the relevant factors set out in section 114(2). He accepted that the evidence was, if true, of substantial probative value. He was plainly well aware that the assertion went to the heart of the defence of Finch and that there was otherwise only the evidence of Finch himself, so that the assertion was of considerable importance to the case as a whole. He concluded, however, that oral evidence of what Richer said about Finch was available to be given. He was unable to see how Richer could damage his own position by giving evidence that Finch was an innocent passenger. He also considered, in reference to sub-paragraph (e) of section 114(2), the potential unreliability of Richer if he was not prepared to support in the witness box what he had said to the police. He correctly addressed the difficulty for the Crown of controverting or challenging Richer's assertion if Richer were not in the witness box to make it. His conclusion was that the interests of justice did

Footnotes

⁴⁵⁵ [1998] AC 124

⁴⁵⁶ [2007] 1 WLR 1645, [2007] EWCA Crim 36

not call for the interviews to be admitted as hearsay. Plainly in reaching that conclusion the principal factor was the fact that Richer was available to give oral evidence if compelled to do so, together with the various consequences which that entailed.

23. This was a situation calling for the exercise of the judgment of the trial judge. This court will interfere if, but only if, he has exercised it on wrong principles or reached a conclusion which was outside the band of legitimate decision available to him. We are unable to see that his decision can be criticised on either ground. We do accept that there are some difficulties for an appellant and his counsel in this situation when faced with a potential witness who is reluctant to give evidence. Richer would not of course have been called entirely blind. There may not have been a recent proof of evidence but there were the interviews with the police, properly recorded, available as an indication of what he could say. Had he in evidence not supported them it would have been open to Miss Radcliffe to seek to treat him as adverse and, had that been done and his previous inconsistent statements put to him, the latter would under the modern law have stood as evidence of any matter stated in them - see section 119 of the new Criminal Justice Act 2003. We understand, nevertheless, that an appellant might well decide, as this one did on advice, that calling such a witness was a risk that he was unprepared to take. It does not, however, follow that wherever that happens the interests of justice call for the admission in evidence of something which the reluctant witness has said out of court but is not prepared to support on oath. On the contrary, the reluctance only undermines the reliability of the evidence. We agree with the judge that in this case Richer's refusal to give evidence voluntarily plainly carried the suggestion that he was anxious that he would not be believed. Whether he was anxious that he would be disbelieved about the role of Finch or about his own role or about both we cannot tell, and nor could the judge, but either way his credibility was put severely in question by his reluctance to enter the witness box. We should say that we reach that conclusion without examining in detail what are said to be several doubtful features of Richer's assertions which exonerate Finch. In the end, had his evidence been before the jury those criticisms of what he said would have been, we accept, for the jury.

24. Whatever might be the situation if an erstwhile co-accused were to be unavailable or had demonstrably good reason not to give evidence, it will, as it seems to us, often not be in the interests of justice for evidence which the giver is not prepared to have tested to be put untested before the jury. It is not in short the law that every reluctant witness's evidence automatically can be put before the jury under section 114. We are satisfied that in this case the judge was right on both issues and this appeal must in consequence be dismissed."

Directions

- In the usual case, the jury will require a specific direction that the out of court statement of one defendant is not admissible in the case of another.
- If, however, the confession of a defendant's co-accused or other person has been admitted against him upon an application by the prosecution under section 114(1)(d) or section 119 Criminal Justice Act 2003⁴⁵⁷, appropriate directions will be required to enable the jury to make an assessment of its reliability, and the jury should receive a specific warning about the possible self-interest, if any, for the hearsay assertions made against the defendant.

Footnotes

⁴⁵⁷ See Chapter 14 Hearsay

- If the confession of a co-accused or another has been admitted upon an application by the defendant under section 76A PACE 1984, or section 114(1) or section 119 CJA 2003⁴⁵⁸, appropriate directions will be required to enable the jury to make an assessment of its reliability. If the effect of the confession is to implicate the maker of the statement while exonerating the defendant it will be appropriate to remind the jury of the burden and standard of proof – if the statement is true or may be true then it is (or may be) inconsistent with the defendant's guilt.
- In a joint trial, there may have been, at the close of the evidence, an application by D1 for a direction that a hearsay statement in the interview of D2 which implicates D3 is admissible in D1's case (supporting D1's case that D3 was responsible). The trial judge will need to ascertain the purpose for which the defendant is seeking to rely on the evidence. In the example given, if the statement is admitted the legal directions will need to be framed so as to reflect the burden and standard proof in the cases of D1, D2 and D3 respectively. If the statement may be true, it may exonerate D1; D2 may, however, have had an interest of his own to serve; and in the case of D3 the prosecution must satisfy the criminal burden and standard of proof.

Illustration – standard warning that the out of court statement of one defendant is not evidence in the case of the other

What each of these defendants said in interview under caution is evidence only in his own case. You may not have regard to D1's answers in interview when considering the case of D2 even though D1 made references to D2, and the same applies in reverse. The reason for this is that each defendant was interviewed separately and during his interview his co-defendant was not present to make any comment of his own upon what was said.

[Both D1 and D2 have now given evidence. In large measure they have adopted and repeated what they said in interview. They are both present and each has had the opportunity to challenge the other's account. Thus the evidence of each defendant is relevant and admissible in the other's case and you may have regard to it for that purpose.]

Illustration – previous inconsistent statement in interview by D1 – statement becomes admissible under section 119 – evidence in the case of D2 – Makanjuola warning

D1 accepts that in his interview under caution he admitted that, in his presence, D2 made a demand from V for money. When counsel for the prosecution asked him about this passage in the interview, D1 repeated his denial that D2 had made any such demand and could provide no explanation why he should have said the opposite in interview. You will need to consider which of these accounts is true. D1's admission in interview is evidence that D2 did indeed make the demand from V for money. If you are sure that D1 told the truth in his interview under caution you are entitled to act upon that finding when you are considering the cases of both D1 and D2.

Footnotes

⁴⁵⁸ See [Chapter 14 Hearsay](#)

Before you rely on D1's admission as evidence against D2, you need to bear in mind, first, that D2 was not present when the admission was made. He was in no position to challenge what was being said and you do not know what his reaction might have been if he had been present. Secondly, D1 was also under suspicion. He had his own interest to look after when being interviewed. In the present circumstances you may wonder how D1 could have been helping his own case by admitting that D2 made a demand of V in his presence, since it was being put to him that both of them ran off with V's money. However, you will appreciate that, when a suspect is being interviewed under caution, self-protection is a powerful incentive to deflect responsibility, however slight the advantage may now appear.

Only if you are sure that D1 told the truth in interview and lied in his evidence should you use his admission in interview as evidence that D2 made the demand from V.

Illustration – section 114 interests of justice – hearsay statement of D1 admitted on application of D2 – statement implicates D1 and may exonerate D2 – direction jury must be sure of the statement if it is to be evidence against D1 – if the hearsay is true or may be true it supports the case of D2

The prosecution case is that D1 and D2 attacked V together. They each deny participation and each blames the other for V's injuries. You have heard evidence from Mr A, a neighbour of D1, who saw D1 returning home. Mr A saw that D1 had blood on his T shirt and asked him what he had been doing. D1 told Mr A that he and D2 had emerged from the club to be confronted by V. An argument developed into a fight between D1 and V. D1 told Mr A that he gave V a hammering. Counsel for D2 asked Mr A whether D1 said anything about the involvement of D2 and Mr A said, "No". D1 denies that any such conversation occurred. He says he did not see Mr A that night.

You may consider Mr A's evidence in the cases of both D1 and D2 but I need to explain how you should approach it.

You must first consider the evidence of Mr A and D1 on the question whether this conversation took place at all. If you are sure a conversation did take place, you next need to consider whether Mr A gave a reliable and accurate account of it. If you were to conclude that Mr A did his best accurately to recall the conversation, that does not of itself dispose of the possibility of mistake. Mr A did not make a note of the conversation and he did not report it to the police. Two weeks after the incident police officers were interviewing Mr A about another matter entirely. He mentioned the incident involving his neighbour and, for the first time, gave an account of the conversation which he repeated in a witness statement made that day. Before you treat Mr A's evidence as supporting the prosecution case that D1 was involved in the attack on V, you must be sure that in its essentials Mr A has correctly recalled it.

D2 relies on the same conversation. His case is that although he was present he did not take part in the assault on V. It is said on D2's behalf that D1 had nothing to gain by neglecting to mention D2 to Mr A if the truth was that D2 took part. You are invited to conclude that the conversation did take place and that D1 told Mr A the truth.

The prosecution submit that D1 was not making a reluctant confession. He was bragging to Mr A about the hiding he had given V. He was, in other words, taking all the credit for violence of which D1 was proud when the truth was it was a cowardly attack by two men upon one. For this reason you should treat D1's account as reliable only when he is making an admission against his own interest and not as any support for D2's case that he did not take part.

When you are considering D2's case, you should examine these competing submissions. If you are sure that the prosecution submission is right, D1's account to Mr A may provide no support for D2's case. If, on the other hand, you conclude that D1 did give or may have given to Mr A a literal description of what occurred, the fact that he omitted any reference to involvement by D2 would be a significant factor in support of D2's denial of involvement. The weight you attach to it is a matter for you to decide.

Sources

Archbold 15-388/389, 15-353a/355, 11-3; Blackstone F17.50, F6.35, F16.20, F17-19; Hearsay Evidence in Criminal Proceedings, 2008, Professor John Spencer

(4) Defendant's Failure to Mention Facts when Questioned or Charged

Introduction

The statutory inferences

1. Section 34(1) and (2) Criminal Justice and Public Order Act 1994⁴⁵⁹ provide that if the defendant is questioned under caution or charged with an offence, and he fails to mention a fact later relied on in his defence at trial which, in the circumstances then prevailing, he could reasonably have been expected to mention, the jury, in determining whether the defendant is guilty of the offence charged, may draw such inferences from the failure as appear "proper". The object of section 34 is to deter late fabrication of defences and to encourage early disclosure of genuine defences.
2. By section 34(2A)⁴⁶⁰ no inference may be drawn unless the defendant was given the opportunity to consult a solicitor before being questioned or charged.

The defendant's failure to mention facts

3. The statutory right to draw inferences is aimed at the failure to mention facts on which reliance is placed at trial, not mere silence.⁴⁶¹ If a prepared statement is submitted by or behalf of the defendant in lieu of answers to questions posed in interview, no inference is available unless the defendant later relies on facts which do not appear in the prepared statement.⁴⁶² Where the criticism is that the defendant has varied his account between his statement (or interview) and his evidence, the right approach may be to consider a lies direction rather a direction under section 34.⁴⁶³ Facts may be relied upon notwithstanding the defendant has not asserted them in evidence. A positive case put in cross-examination may be sufficient.⁴⁶⁴ An admission by the defendant during his evidence of a fact relied on by the prosecution does not without more constitute reliance by the defendant.⁴⁶⁵ A failure to mention a fact which is admittedly true cannot found an adverse inference since the inference contemplated by section 34 is that the disputed fact is not true.⁴⁶⁶

Which he could reasonably have been expected to mention

4. The question whether the defendant, in the circumstances prevailing at the time, could reasonably have been expected to mention the relevant fact may depend upon a variety of factors which, usually, should be left for the jury to determine. In *Argent*⁴⁶⁷ Lord Bingham CJ identified the following factors:

"The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental

Footnotes

⁴⁵⁹ For the full text see Archbold 15-414; Blackstone F19.4

⁴⁶⁰ Added by the Youth Justice and Criminal Evidence Act 1999, section 58, to bring compliance with *Murray v. UK* [1996] 22 EHRR 29

⁴⁶¹ *Brizzalari* [2004] EWCA Crim 310; *Argent* [1997] 2 Cr App R 27 at §32; *T v. DPP* [2007] EWHC 1793 (Admin) at §§20 and 26

⁴⁶² *Knight* [2004] 1 WLR 340, [2004] 1 Cr App R 9, [2003] EWCA Crim 1977

⁴⁶³ *Turner* [2003] EWCA Crim 3108

⁴⁶⁴ *Webber* [2004] 1 WLR 404 (HL), [2004] 1 Cr App R 40, [2004] UKHL 1

⁴⁶⁵ *Betts* [2001] 2 Cr App R 16 (page 257), [2001] EWCA Crim 224, at §33; c.f. *Daly* [2002] 2 Cr App R 201, [2001] EWCA Crim 2643

⁴⁶⁶ *Webber* (*supra*) at §28

⁴⁶⁷ *Supra* at page 32.

capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time. It is for the jury to decide whether the fact (or facts) which the defendant has relied on in his defence in the criminal trial, but which he had not mentioned when questioned under caution before charge by the constable investigating the alleged offence for which the defendant is being tried, is (or are) a fact (or facts) which in the circumstances as they actually existed the actual defendant could reasonably have been expected to mention.

Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as that he was tired, ill, frightened, drunk, drugged, unable to understand what was going on, suspicious of the police, afraid that his answer would not be fairly recorded, worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury.

In other cases the jury may conclude, after hearing all that the defendant and his witnesses may have to say about the reasons for failing to mention the fact or facts in issue, that he could reasonably have been expected to do so. This is an issue on which the judge may, and usually should, give appropriate directions. But he should ordinarily leave the issue to the jury to decide. Only rarely would it be right for the judge to direct the jury that they should, or should not, draw the appropriate inference."

Legal advice and privilege

5. Defendants who remain silent in the face of questioning often give as their reason advice from a solicitor. Like any other, this is a reason which the jury is entitled to examine. Conversations between the suspect and his solicitor are subject to legal professional privilege and the defendant is not bound to waive that privilege. If it is not waived the right must be respected.⁴⁶⁸ The privilege will be waived if the defendant or his solicitor gives evidence of the reason for the advice.⁴⁶⁹
6. The question whether the defendant could *reasonably* have been expected to mention the fact now relied on may ultimately depend upon the jury's decision whether to reject legal advice as the *true* reason for his failure to mention it.⁴⁷⁰ The defendant may genuinely have believed in his entitlement to rely on his solicitor's advice, but if the jury conclude that the failure to mention the disputed facts was nevertheless unreasonable, they may infer that his true reason was the absence of an account to give, or none that would stand up to scrutiny. In *Beckles*⁴⁷¹ the Court of Appeal approved the approach to this effect taken by the court in *Betts and Hoare*⁴⁷². As Auld LJ said in *Hoare*⁴⁷³:

"It is not the purpose of section 34 to exclude a jury from drawing an adverse inference against a defendant because he genuinely or reasonably believes that, regardless of his guilt or innocence, he is entitled to take advantage of that advice to impede the prosecution case against him. In such a case the advice but because

Footnotes

⁴⁶⁸ *Beckles* [2005] 1 WLR 2829, [2005] 1 Cr App R 23, [2004] EWCA Crim 2766 at §43

⁴⁶⁹ *Bowden* [1999] 2 Cr App R 176; *Loizou* [2006] EWCA Crim 1719 at §84

⁴⁷⁰ *Betts* (supra) at §53; *Webber* (supra) at §27

⁴⁷¹ *Supra* at §§ 44-45

⁴⁷² [2005] 1 Cr App R 355, [2004] EWCA 784

⁴⁷³ At §§54-55

he had no or no satisfactory explanation to give. For this purpose, but only for this purpose, section 34 in its provision for the drawing of an adverse inference, qualifies a defendant's right to silence. However, it is still for the prosecution to prove its case, section 38(3) of the 1994 Act ensures that a finding of a case to answer or a conviction shall not be based solely on such an inference."

The reasoning of Maurice Kay LJ in *Betts* and Auld LJ in *Hoare* was endorsed by Lord Woolf CJ in *Beckles* in slightly different terms ⁴⁷⁴:

"In our judgment, in a case where a solicitor's advice is relied upon by the defendant, the ultimate question for the jury remains under section 34 whether the facts relied on at the trial were facts which the defendant could reasonably have been expected to mention at interview. If they were not, that is the end of the matter. If the jury consider that the defendant genuinely relied on the advice, that is not necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence. In *Betts & Hall*, Lord Justice Kay was particularly concerned [at paragraph 54] with "*whether or not the advice was truly the reason for not mentioning the facts.*" In the same paragraph he also says "*A person, who is anxious not to answer questions because he has no or no adequate explanation to offer, gains no protection from his lawyer's advice because that advice is no more than a convenient way of disguising his true motivation for not mentioning facts.*" If, in the last situation, it is possible to say that the defendant genuinely acted upon the advice, the fact that he did so because it suited his purpose may mean he was not acting reasonably in not mentioning the facts. His reasonableness in not mentioning the facts remains to be determined by the jury. If they conclude he was acting unreasonably they can draw an adverse inference from the failure to mention the facts."

The fairness of the trial

7. The ability of the jury to draw an inference of guilt from the defendant's failure does not infringe Article 6 fairness. The ultimate question is whether the inference could fairly be drawn in the circumstances. The trial judge is required to emphasise the defendant's right to silence and to ensure that the jury understand "that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination." ⁴⁷⁵
8. In *Murray v. UK* ⁴⁷⁶ and *Beckles v. UK* the Court emphasised that a conviction based wholly or mainly on the adverse inference infringed the defendant's right to silence. Section 38(3) of the 1994 Act prohibits conviction based 'solely' upon an adverse inference. In *Chenia* ⁴⁷⁷ the Court of Appeal advised that trial judges should follow the then JSB's latest specimen direction (2001) since it seemed to have acquired the approval of the ECtHR in *Beckles v. UK*. That direction included the words, "If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it". ⁴⁷⁸

Footnotes

⁴⁷⁴ At §46

⁴⁷⁵ *Condon v. UK* [2001] 31 EHRR 1 at §61; see also *Beckles v. UK* [2003] 36 EHRR 162 at §64

⁴⁷⁶ [1996] 22 EHRR 29

⁴⁷⁷ [2003] 2 Cr App R 83, [2002] EWCA Crim 2345

⁴⁷⁸ That a direction to this effect is required was confirmed in *Petkar* [2004] 1 Cr App R 270, [2003] EWCA Crim 2668

The inferences available

9. The identification of the inferences available will be governed by the development of the evidence in the case. It should be faced by the parties during the course of the evidence, and requires discussion with the advocates before speeches. Possible inferences or conclusions will include the following:
 - (1) The fact now relied on is true but the defendant, for reasons of his own, chose not to reveal it;
 - (2) The fact now relied on is irrelevant;
 - (3) The 'fact' now relied on is of more recent invention;
 - (4) The defendant's present answer to the prosecution case is fabricated;
 - (5) The defendant is guilty.
10. The obvious inference from failure to mention a fact is that the 'fact' is not true. Rejection of the fact which the defendant failed to mention may, or may not, justify a further adverse inference. If the fact now relied on is, in effect, the defendant's defence to the charge, his failure to mention it may undermine his whole defence as a recent invention, put forward only after the defendant had the opportunity to tailor his account to the prosecution evidence. Alternatively, the fact now relied on may be peripheral or secondary or irrelevant, the falsity of which would not necessarily undermine the defence. The appropriate inference may be that the 'fact' was invented to improve the defence, leaving open the question whether the defence is true or false. Finally, the jury may be sure that the defendant could reasonably have been expected to mention the fact but not sure that any adverse inference should be drawn, even an inference that the 'fact' is false. It follows that care must be taken to ensure that the jury understands the range of permissible inferences and, if necessary, that the inference they may draw may be of no assistance or of limited assistance in judging the defendant's guilt.

The Mountford problem

11. Particular difficulties may arise when it is argued on behalf of the defendant that the jury cannot determine the reason for the defendant's failure to mention his defence without first deciding whether the defence is true. In *Mountford*⁴⁷⁹ two accused were charged with possession of the controlled drug, heroin, with intent to supply. Police officers entered a flat and found Williams and Mountford. M threw a package out of the window. It was found to contain 4.25g heroin at 30% purity. M had £70 in cash in his possession. There was evidence that heroin was dealt in £10 wraps. The police found scales in active use. W pleaded guilty to the lesser offence of allowing his premises to be used for the supply of drugs and gave evidence for the prosecution against M. W said in evidence that M was staying at his flat and against his wishes was dealing heroin. M advanced the defence that, on the contrary, the drug belonged to W who was a dealer. He was not staying at the flat but had visited W to make a purchase of heroin. When interviewed, M, on advice, made no comment to the incriminating circumstances put to him in interview. M's explanation for his silence was that he had not wished to put blame on W who was his supplier, but if he had known that W was implicating him that would have made a 'big difference'. In his directions to the jury the trial judge said:

"The defendant was legally represented, the defendant knew that the prosecution case was that he was in possession of heroin with intent to sell it for profit yet he said nothing when interviewed by the police. That of course was his right, but the defendant as part of his defence has relied upon the fact that it was

Footnotes

⁴⁷⁹ [1999] Crim LR 575, 21 December 1998

Williams who was in possession of the heroin and it was Williams not the defendant who was dealing in heroin and intending to sell it ... the prosecution case is that Mountford did not mention that fact when he was questioned under caution ... the prosecution case is that in the circumstances when he was questioned he could reasonably have been expected to mention that ... you must decide whether in the circumstances which existed at the time it was a fact which he could reasonably have been expected to mention.

The defendant's explanation in evidence was that he did not want to put the blame on to Williams but had he known Williams had blamed him in his police interview he, Mountford, would have had a different view about making 'no comment'....."I decided to say nothing. I didn't say anything to the police as I didn't want to land Williams in trouble."

Now the law is that you may draw such inferences as appear proper from Mountford's failure to mention when interviewed a fact he later relied on in court. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot on its own prove guilt, but depending on the circumstances, you may hold that failure against him when deciding whether he is guilty, that is to take it into account as some additional support for the prosecution case. It is for you to decide whether it is fair to do so in the light of the defendant's evidence."

The Court held on appeal that the jury could not reject M's explanation for his silence in interview without also rejecting the defence itself. There was thus an element of circularity in the application of section 34. On very similar facts the Court (Henry LJ also presiding) came to the same conclusion in *Gill* ⁴⁸⁰.

12. However, in *Hearne and Coleman* ⁴⁸¹, a case on very different facts, the appellant attempted to extract a principle from Mountford that where the reason for silence lay in the truth or falsity of the defence itself no section 34 inference should be drawn from silence. The court (Mantell LJ presiding) rejected this proposition since to uphold it would drive a coach and horses through the statutory purpose. The decision should, in the court's view, be confined to Mountford's singular facts. The point was raised again in *Gowland-Wynn* ⁴⁸². Lord Woolf CJ said:

"We are quite satisfied that the comments of Mantell L.J. [in *Hearne and Coleman*] are right in so far as they suggest that to follow the approach which was adopted by this Court in the other two cases [*Mountford* and *Gill*] has the effect of emasculating and defeating the very purpose of section 34. Particularly where a defendant does not comment, when he could be expected to comment about something which goes right to the heart of his defence, it seems to us that section 34 has the largest and most significant part to play. In those circumstances we consider that in future *Mountford* and *Gill* which endorsed it, should be consigned to oblivion and not relied upon by courts. It may be that they could be confined to their special facts, but we find difficulty in identifying how those special facts could be recognised. We consider that judges and juries will be caused undue difficulty if in the future any attention is paid to those authorities. The important matter to bear in mind with regard to section 34 is the fact that the burden of proof remains upon the Crown throughout."

Footnotes

⁴⁸⁰ [2001] 1 Cr App R 160

⁴⁸¹ [2000] 6 Archbold News 2

⁴⁸² [2002] 1 Cr App R 41, [2001] EWCA Crim 2715

13. *Mountford* received further criticism from Lord Bingham in *Webber*⁴⁸³:

"The jury had to decide whether the appellant was in possession of the drug with intent to supply. Had they concluded that only one of the two men was or might be the supplier and that that one was or might have been Williams, that would have defeated the prosecution. But, if Williams was the supplier, and the jury was not impressed by the appellant's explanation for not naming him, it was open to the jury to regard the appellant's failure to mention this fact as a pointer towards the untruth of that explanation, thus strengthening the prosecution case and weakening his own. Section 34 applied, and the direction was rightly given."

14. The issue raised in *Mountford* and *Gill* should be treated as settled, but not before it had generated some interesting academic discussion.⁴⁸⁴

The trial judge's solution to the Mountford problem

15. It is suggested that the trial judge's dilemma is solved by an adherence to the statutory words. The *reasonableness* of the failure to mention facts is to be distinguished from the *truth* of the facts the defendant failed to mention. The statutory words do not require the jury to make a decision about the truthfulness of the fact relied on before considering whether the defendant could reasonably have been expected to mention it. On the contrary, the jury's task is to examine, first, the question whether the failure to mention the fact was *reasonable*; second, and if not, whether that failure supports an inference that the 'fact' is *untrue*. In *Mountford* the question for the jury was whether M could reasonably have been expected to mention that W was his supplier. There were two possible conclusions:

- M could not reasonably have been expected to mention that W was his supplier because in real life it would have been unreasonable to expect a user to identify his supplier; or
- M could reasonably have been expected to mention that W was his supplier, because it would have been unreasonable not to disclose a complete defence as early as possible.

16. In the first event, no inference would have been available to the jury because they had decided that the statutory test had not been met. In the second event, the jury would have to decide what inference may be proper. In the *Mountford* circumstances the jury might, but not necessarily would, conclude that they could not safely draw an adverse inference because it is common knowledge that, whether reasonable or not, a drug user *will* protect his dealer. In other words, the unreasonableness of the defendant's silence may surrender no clue to the truth or falsity of his defence.

17. If faced with the *Mountford* dilemma the trial judge should leave the section 34 decision to the jury. He will need to explain that the jury must *first* decide whether the defendant could reasonably have been expected to mention the fact on which he now relies and, *second* and if so, what, if any, inferences are available from his failure to do so. The facts of *Mountford* as interpreted by the Court of Appeal illustrate the scope for the possibility that a jury may be quite sure the defendant could reasonably have been expected to mention his defence, but not sure that they should infer that the failure to mention it was

Footnotes

⁴⁸³ Supra at §26

⁴⁸⁴ See, for example, Professor Roderick Munday's article Archbold News 2002, 'Inferences and Explanations'

motivated by its untruthfulness. It will be recalled, however, that Mr Mountford was convicted by the jury. The trial judge's responsibility is to ensure that the jury is properly guided. There will be rare circumstances in which, although section 34 applies, the judge may be required to warn the jury against drawing any inference.⁴⁸⁵

18. Inferences (3), (4) and (5), at paragraph 9 above, are not necessarily synonymous. The defence to a charge of assault may be alibi, raised for the first time in the defence statement, after a 'no comment' interview, and supported by evidence at trial. The jury may be sure that the alibi defence should have been revealed during interview under caution and, for that and other reasons, reject it. If, however, the evidence for the prosecution reveals the possibility that the defendant acted in self defence, inference (5) is not an inevitable consequence of the rejection of the defendant's alibi defence. Similarly, in a case of murder, the defendant's silence may permit the inference that he inflicted injuries but not necessarily that he did so with intent or without provocation. Such cases reinforce the need for the trial judge to assist the jury with the possible inferences.

Directions

Both the Court of Appeal and the House of Lords have emphasised the need for discussion between the trial judge and the advocates before framing directions on this subject to the jury.

In *Petkar*,⁴⁸⁶ Rix LJ summarised the effect of authority both domestic and European, as it was reflected in the JSB's specimen direction current in 2003. Directions to the jury should include the following:

1. The facts which the accused failed to mention but which are relied on in his defence should be identified.
2. The inferences (or conclusions, as they are called in the specimen direction) which it is suggested might be drawn from failure to mention such facts should be identified, to the extent that they may go beyond the standard inference of late fabrication.
3. The jury should be told that, if an inference is drawn, they should not convict "wholly or mainly on the strength of it".
4. The jury should be told that an inference should be drawn "only if you think it is a fair and proper conclusion".
5. An inference [of guilt] should be drawn "only if...the only sensible explanation for his failure" is that he had no answer or none that would stand up to scrutiny. *In other words the inference canvassed should only be drawn if there is no other sensible explanation for the failure.*
6. An inference should only be drawn if, apart from the defendant's failure to mention facts later relied on in his defence, the prosecution case is "so strong that it clearly calls for an answer by him".

Footnotes

⁴⁸⁵ See also *Essa* [2009] EWCA Crim 43 in which Hughes LJ advised at §17 that the trial judge should pause and consider whether a section 34 direction would assist on the facts of the particular case.

⁴⁸⁶ *Supra* at §51

7. The jury should be reminded of the evidence on the basis of which the jury are invited not to draw any conclusion from the defendant's silence. (It is only after a jury has considered the defendant's explanation for his failure that they can conclude that there is no other sensible explanation for it).
8. A special direction should be given where the explanation for silence of which evidence has been given is that the defendant was advised by his solicitor to remain silent.

The italicised words at point 5 exemplify the need to identify legitimate inferences before directing the jury on the statutory test. It is particularly important that the judge's directions are crafted within the context of the facts of the case and the evidence given. It will not assist the jury to repeat the words of the specimen without placing them in their specific factual context.

Since the JSB's specimen direction has been consistently approved by the Court of Appeal, House of Lords and the ECtHR, the December 2004 version is reproduced in full at Appendix 2.

Illustration⁴⁸⁷ – *defendant charged with possession class A drugs with intent to supply - found in possession of package containing drugs – failure to mention when questioned that he was purchaser and X was supplier – reason for failure legal advice and wish to protect supplier – whether adverse inference available*

The defendant was interviewed under caution about these matters within hours of his arrest. It was put to him that when the police entered X's flat, there were two men present, the defendant and X; that the defendant was seen by two police officers to throw a package from the back window; that the package was recovered and its contents, when analysed, revealed a powder believed to be heroin (we have since learned it contained 4.25 grammes of powdered heroin of 30% purity); that when the defendant was searched, he was found in possession £70 in cash; that on the street heroin is sold in £10 wraps; that the defendant was staying at X's flat and using it as a base for selling £10 wraps. The defendant, in answer to each of these questions, said 'No comment'. (1)⁴⁸⁸ The defendant now says that the package did not belong to him but to X; that he was not staying with X; that had visited X to purchase a wrap of heroin about half an hour before the police entered; that X threw the package to the defendant who, instinctively, threw it out of the window.

(2) The prosecution argues that if there was any truth in the defence now put forward the defendant would have mentioned it as soon as he was questioned; that the only reason for not mentioning his defence must have been that he did not then have any answer to give; he waited until the prosecution served its evidence and then constructed a false accusation against X in an attempt to answer the case he had to meet.

Parliament has provided that, if, in the circumstances prevailing at the time, the defendant could reasonably have been expected to mention when questioned facts on which he later relies at his trial, but chose to remain silent, you, the jury, may draw any inference (in other words, reach any conclusion) from that silence which you think fair and proper. The inference you are invited by the prosecution to draw is that the defence now put forward by the defendant is false.

Footnotes

⁴⁸⁷ After Mountford

⁴⁸⁸ These are references to the numbered paragraphs setting out the *Petkar* advice above

The first question for you to consider is whether in the circumstances the defendant could reasonably have been expected to tell the officers (1) that he was there to purchase heroin from X, not to sell heroin to him or to anyone else.

What were the circumstances prevailing at the time? First, there was the caution. You will recall that before the interview began the defendant was told that he need not say anything; anything he did say may be given in evidence. You should remember that it was, indeed, his legal right to remain silent. A defendant is perfectly entitled to decline to answer questions put to him by the police and not to reveal what may be his defence until any subsequent trial. Usually, you might expect an innocent man to give his response as soon as possible. So the defendant was told that it might harm his defence if he failed to mention when questioned something on which he later relied in court. The point of the caution was to inform the defendant fully as to his rights but also to explain how his silence could count against him.

Second, you need to consider (6) whether the case being put to the defendant was sufficiently strong to demand a response from him. Here, the defendant was seen in possession of the package containing heroin and to throw it from the window. Did the defendant have a compelling reason to tell the police straight away that the package was not his but X's, that he was a purchaser and not a seller?

Third, (7) you need to consider the defendant's reason for remaining silent. He told you that he saw a solicitor privately before the interview and was advised that he should make no comment. He said that he and X, separately, saw the same solicitor. The defendant did not know what X had said. He did not seek an explanation from the solicitor for the advice given to him. He decided to accept her advice because he assumed the solicitor knew what she was talking about. The fact the advice was given is not disputed. The reasons for the advice were not explored in evidence because the conversation was confidential, and you should not speculate what the solicitor's reasons may have been.

(8) The fact that the defendant had been advised to say nothing is an important consideration, but it is not necessarily an answer to the prosecution's argument. As the defendant concedes, the choice whether to put forward an explanation was his to make. If the defendant had a good defence but chose on his solicitor's advice to say nothing, that is one thing, but if the real reason for his silence was that he had no defence to put forward, and he just used her advice as a convenient excuse for evading the truth, that is another.

You will recall that when he was cross examined on behalf of the prosecution there was a shift in the defendant's position. When pressed, he said, "Well, there was another reason. I didn't know what X was going to say. X was my supplier. The last thing I would do is grass him up." The defendant could not explain why he had not mentioned this when asked questions by his own counsel. It was put to the defendant that this was yet another example of his opportunism, fitting his story, as he went along, to the case he had to meet. The defendant denied that accusation.

You need to consider whether it would have been reasonable, in the circumstances prevailing at the time, for the defendant to have mentioned his defence. If you are sure it would have been reasonable to do so, then you are entitled to consider what, if any, conclusion it would be proper to reach.

It is submitted on behalf of the defendant that you should reach no adverse conclusion from his silence. It is submitted that if X was indeed the defendant's supplier the defendant would have had every reason not to disclose that fact to the police. It is common knowledge that for all sorts of reasons a user of drugs may not be prepared to identify his supplier. This is an argument which you should consider with care. In order to resolve it you will first need to decide whether the defendant was telling the truth when in cross

examination, for the first time, he raised this as a reason for his silence. If the defendant was or may have been telling you the truth in this respect, then you may think it would be indeed be unsafe to reach any conclusion adverse to the defendant based merely upon his silence in interview. However, that is a decision for you to make.

(5) Having considered the defendant's explanations, it is open to you to conclude that the only sensible reason for the defendant's silence is that at that time he had no answer to the questions put to him or, at least, none that would stand up to scrutiny. If that is your conclusion then you may also conclude that the defence now put forward is a later invention and false. I have said that these conclusions are open to you but this is a decision for you to make. You should only reach such conclusions if you are sure (4) that they are fair and proper. Furthermore, (3) you should not convict just because or even mainly because the defendant's chose to make no comment. The principal evidence on which you must make your final decision is that of X on the one hand and the defendant on the other. Remember that the burden remains on the prosecution to prove, so that you are sure, that the defendant is guilty.

Sources

Archbold 15-414/432; Blackstone F19.4/15

(5) Defendant's Failure to Account for Objects, Substances and Marks

Introduction

Section 36 Criminal Justice and Public Order Act 1994 permits the jury to draw an inference adverse to the defendant from the defendant's failure or refusal, when requested, to account for any object, substance or mark.⁴⁸⁹ 'Substance or mark' includes the condition of clothing or footwear. The section concerns only the refusal to account. Any adverse inference arising from the fact of possession of the object or the presence of the substance or mark is additionally available at common law.

The qualifying conditions are ⁴⁹⁰:

1. The defendant was arrested by a constable (constable includes a customs officer);
2. There was on his person, clothing or footwear, or otherwise in his possession, or in a place where he was at the time of his arrest, any object, substance or mark;
3. That constable or another constable investigating the case reasonably believed that the presence of the object, substance or mark may be attributable to the participation of the defendant in an offence which the constable specified;
4. The constable informed the defendant of his belief and requested him to account for the presence of the object, substance or mark;
5. The constable informed the defendant in ordinary language, when making the request, of the effect under the section of a failure or refusal to account for the object, substance or mark ⁴⁹¹;
6. If the request was made at an authorised place of detention, the defendant was allowed the opportunity to consult a solicitor before the request was made ⁴⁹²;
7. The defendant failed or refused to account for the object, substance or mark.

Directions

In *Compton*⁴⁹³ the defendants, being investigated for drug trafficking, were asked in interview to account for the presence of heroin contamination on a large quantity of banknotes found in their possession. They made no comment on advice from a solicitor. The Court of Appeal held that a suitably adapted section 34 direction (failure to mention facts later relied on at trial) was required. Buxton LJ said:

"37. We would wish strongly to reinforce the importance of correct directions being given in respect of failures under both section 34 and section 36, not least because this is an area that has attracted the concern of the ECtHR. It is perhaps more important here than in respect of some other issues in a summing-up that the guidance given both by this court and by the JSB is closely mirrored in

Footnotes

⁴⁸⁹ For the section in full see Archbold 15-433; Blackstone F19.16

⁴⁹⁰ Unless stated, section 36(1) CJPOA 1994

⁴⁹¹ Section 36(4) CJPOA 1994. See also PACE 1984 Code C paras 10.10/11

⁴⁹² Section 36(4A) CJPOA 1994

⁴⁹³ [2002] EWCA Crim 2835

what the judge says. That said, however, we have to see what basic fairness, which is what article 6 is concerned with, has been held to require. The most crucial point is that the jury must be told that they can only hold against the defendant a failure to give an explanation if they are sure that he had no acceptable explanation to offer. It is noticeable that, in all of the recent cases drawn to our attention where directions have been found wanting, that crucial element had or may have been omitted: see *Betts & Hall* at §55; *Chenia* [2002] EWCA Crim 2345 at §92; and *Beckles* at §64. The jury must not be led into assessing the quality of the decision to remain silent rather than its genuineness: *Betts & Hall* at §53. The judge made neither of these errors, as the latter part of his direction demonstrates.

38. Further, the judge separated consideration of that point from the jury's assessment of the effect of the solicitor's advice: before the jury could draw an inference, they had to be sure both that the solicitor's advice was not an adequate explanation for the silence and that there was no innocent explanation. And he was justified in drawing attention to the fact that an individual has a choice whether to take the solicitor's advice, in so saying anticipating §57 of the ruling of this court in *Betts & Hall*. Nor was any specific submission made to us as to what more the judge should have said about the legal advice. The more expansive account that might seem to be called for by *Beckles* was a requirement stated in the circumstances of that case, where the judge had undermined or appeared to undermine the evidence of the defendant that he had relied on legal advice at all.

39. Had the judge been directing the jury some few months later, he would no doubt have employed the format of the JSB direction, suitably adapted to the circumstances of the particular case. That course has the advantage that it makes it less likely that appeals will follow or will appear plausible. We are however satisfied that the direction that the judge in fact gave was sufficient to meet all of the protective precautions that have since then been identified by this court and by the EctHR. These convictions were not unsafe."

Illustration – presence of glass in the defendant's pocket – solicitor's advice to say nothing – explanation for glass given at trial

When the defendant was arrested at his home, an hour after the burglary, he was searched. In his right jacket pocket the arresting officer found several tiny pieces of glass which he placed in an exhibit bag and labelled. PC A, who arrested the defendant, had been to the scene of the burglary. He saw that the burglar had broken a transom window to climb through the narrow opening. Once the defendant had been received by the custody officer arrangements were made for him to see a solicitor who was told by PC A of the relevant facts.

Two hours later the defendant was interviewed under caution by DC B and PC A in the presence of the solicitor. PC A told the defendant of his belief that the glass in the defendant's pocket came from the burglary which had occurred four doors away from the defendant's home and asked him to explain how the glass in his pocket came to be there or might have come to be there. The defendant told the officers he had been advised to say nothing and to each question asked he replied, "No comment".

In evidence, the defendant has now told you that about three weeks before the burglary he was helping his mother to clear up some broken glass in her yard and some of it must have got into his pocket. The prosecution suggest to you that if this account is true the defendant would certainly have given it at the time he was first asked about it. The fact he did not give it at the time shows that the defendant has come up with an excuse which is untrue in a late attempt to deal with incriminating evidence.

What are you to make of the defendant's silence in interview? You must consider the defendant's explanation for his refusal. He had, quite correctly, been told that it was his right to remain silent but that if he failed to provide an explanation for the glass in his pocket it might harm his defence at trial; in particular, you, the jury, might conclude that he had no explanation to give. He says that he accepted legal advice to say nothing. We have not heard why the advice was given, nor has the defendant explained why he accepted it, except to say that a solicitor knows what to do. The defendant did not tell you what he said to his solicitor and we are not entitled to know what was said between them because their conversation was confidential. However, the defendant's decision to accept advice does not preclude you from considering whether it was the real reason for his silence.

The defendant had a choice whether to give an explanation to the officers or not, and he knew the possible consequences of a refusal to do so. If you conclude that the defendant may genuinely have had an explanation to give but decided, on advice, to remain silent, you could not, from his silence, reach a conclusion adverse to his case. But, if you are sure that the real reason for his silence was that he had no explanation to give, and he was simply using his solicitor's advice as a convenient excuse for saying nothing, you are entitled to reach the conclusion that his present explanation is false.

It is a matter for you to decide whether such a conclusion is the fair and proper one to reach in the circumstances. It is also for you to decide what weight you should give to this conclusion when deciding whether the prosecution has proved its case. You should not, however, convict only because or mainly because of his silence and you need to be sure of two things: first, that the matters put to the defendant in interview clearly called for an answer and, second, that the only sensible explanation for his silence was that he had no explanation to give, or none that would stand up to scrutiny.

It is said on the defendant's behalf that one reason why the defendant would have been justified in saying nothing is that it might have turned out that the glass in the defendant's pocket was not of the same refractive index as the glass in the transom window. You should consider this argument with care and ask yourselves whether it may provide a reason why you should not hold the defendant's silence against him. However, you will need to weigh up the fact that there is no evidence that it featured in the defendant's thinking at the time. It is the defendant's true reason for failing to account for the glass fragments which you will need to resolve.

Sources

Archbold 15-433/434; Blackstone F19.16

(6) Defendant's Failure to Account for Presence at a Particular Place

Introduction

Section 37 Criminal Justice and Public Order Act 1994 permits the jury to draw an inference adverse to the defendant from the defendant's failure or refusal to account, when requested, for his presence at a place where an offence was committed.⁴⁹⁴

The qualifying conditions are⁴⁹⁵:

1. The defendant was arrested by a constable (constable includes a customs officer);
2. The defendant was found at a place at or about the time an offence was allegedly committed;
3. That constable or another constable investigating the offence reasonably believed that the presence of the defendant at that place and time may be attributable to his participation in the commission of the offence;
4. The constable informed the defendant of his belief and requested him to account for his presence;
5. The defendant was told in ordinary language by the constable making the request of the effect under the section of a failure to account for his presence⁴⁹⁶;
6. If the request was made at an authorised place of detention, the defendant had been allowed an opportunity to consult a solicitor before the request was made⁴⁹⁷;
7. The defendant failed or refused to account for his presence.

Directions

The requirements of directions to the jury mirror those used for section 34 (failure to mention facts later relied on) and section 36 (failure to account for objects).

Footnotes

⁴⁹⁴ For section 37 see Archbold 15-435; Blackstone F19.16

⁴⁹⁵ Unless stated, section 37(1) CJPOA 1994

⁴⁹⁶ Section 37(3) CJPOA 1994. See also PACE 1984 Code C paras 10.10/11

⁴⁹⁷ Section 37(3A) CJPOA 1994

(7) Failure of Defendant to Make Proper Disclosure of the Defence Case

Introduction

1. The importance of timely fulfilment of the obligation to make statutory disclosure by both the prosecution and the defence is spelled out by “A Protocol for the Control and Management of Unused Material in the Crown Court” which applies to all trials on indictment after 20 February 1996.⁴⁹⁸ The obligation upon the defence arises under sections 5, 6A (in force 4 April 2005; subsection (1)(ca) inserted by CJA 2008⁴⁹⁹ as from 3 November 2008) and 6E (in force 4 April 2005) Criminal Procedure and Investigations Act 1996, as amended, and is confined to the service and contents of the ‘defence statement’.⁵⁰⁰
2. Section 5(5A), (5B) and (5D) (defence disclosure direct to co-accused), to be inserted by section 33(1) Criminal Justice Act 2003, section 6B (updated disclosure by the defence), to be inserted by section 33(3) CJA 2003, section 6C (notification of intention to call defence witnesses, to be inserted by section 34 CJA 2003, section 6D (notification of names of experts instructed by defence), to be inserted by section 35 CJA 2003, and sections 11(4), (7) and (11) (amendments to sanctions for defence failures), to be inserted by 39 CJA 2003, have not yet been brought into force. An amendment to section 11(2)(f)(ii) of the 1996 Act came into force on 3 November 2008 in respect of those cases to which CPIA 1996, Part 1 applies by virtue of section 1(1) or (2).
3. Subject to the formal requirements of service of the case papers⁵⁰¹, the accused must give a defence statement to the court and the prosecutor⁵⁰² within 14 days of the prosecutor’s compliance, or purported compliance, with the duty of primary disclosure under section 3 CPIA 1996. The defence may apply for an extension before the deadline expires.⁵⁰³
4. The current requirements for the contents of a defence statement are set out in section 6A CPIA 1996:

“(1) For the purposes of this Part a defence statement is a written statement—

 - (a) setting out the nature of the accused’s defence, including any particular defences on which he intends to rely,
 - (b) indicating the matters of fact on which he takes issue with the prosecution,
 - (c) setting out, in the case of each such matter, why he takes issue with the prosecution,
 - (ca) setting out particulars of the matters of fact on which he intends to rely in his defence,⁵⁰⁴

and

 - (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

Footnotes

⁴⁹⁸ Archbold Appendix N-52; Blackstone Appendix 4, page 2832

⁴⁹⁹ See Archbold 12-57a

⁵⁰⁰ See also the court’s case management powers under CPR 3.10(b)

⁵⁰¹ Section 5(1)-(4) CPIA 1996

⁵⁰² Section 5(5) CPIA 1996

⁵⁰³ CPIA 1996 (Defence Disclosure Time Limits) Regulations 1997 (SI 1997 No 684) regs 2 and 3

⁵⁰⁴ Sub-paragraph (ca) came into force on 3 November 2008 (Criminal Justice and Immigration Act 2008 (Commencement No. 3 and Transitional Provisions Order 2008 (SI 2008 No 2712))

- (2) A defence statement that discloses an alibi must give particulars of it, including—
 - (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
 - (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.
 - (3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."
5. The following breaches of requirements on the defence attract the sanctions of section 11 CPIA 1996:
- (1) Failure to serve a defence statement or to serve within time (sections 5 and 11(2)(a) and (b));
 - (2) Setting out inconsistent defences in the defence statement (section 11(2)(e));
 - (3) Putting forward at trial a defence not mentioned in the defence statement (section 11(2)(f)(i));
 - (4) Relying on any matter which should have been but was not mentioned in the defence statement (sections 6A(1) and 11(2)(f)(ii)); ⁵⁰⁵
 - (5) Giving evidence of alibi or calling a witness to give evidence in support of an alibi without giving notice in the defence statement (sections 6A(2) and 11(2)(f)(iii) and (iv)).
6. The sanctions provided by section 11(5) are:
- (a) the court or any other party may make any such comment as appears appropriate; ⁵⁰⁶
 - (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned. ⁵⁰⁷
7. The sanctions only come into play in the Crown Court when the case has survived the close of the prosecution case. There is no provision equivalent to section 34(2) Criminal Justice and Public Order Act 1994 (which permits the judge to have regard to out of court silence when determining a submission of no case).
8. It is of critical importance to the ability of the jury to draw an adverse inference that the defence statement, if any, was made by the defendant. Section 6E provides that a defence statement submitted

Footnotes

⁵⁰⁵ In force 3 November 2008 (Criminal Justice and Immigration Act 2008 (Commencement No. 3 and Transitional Provisions Order 2008 (SI 2008 No 2712)))

⁵⁰⁶ By section 11(6) CPIA 1996 if the matter not mentioned was a point of law (including admissibility of evidence), comment by another party may be made only with the leave of the court.

⁵⁰⁷ In Essa [2009] EWCA Crim 43 a challenge to the compatibility of section 11(5) CPIA 1996 with Art 6 ECHR was rejected on the ground that the fairness of questions put to the defendant and comment made was subject to the control of the judge who would ensure fairness.

by the accused's solicitor under sections 5 (compulsory statement) or 6 (voluntary statement), shall, unless the contrary is proved, be deemed to have been given with the authority of the accused. Its effect is to require the defendant to provide an explanation if he is to avoid responsibility for the absence of a defence statement or for its contents.

9. If, at a pre-trial hearing, it appears to the judge that the accused has failed to comply with section 5 (including the requirements of section 6A), so that there is a possibility that comment may be made or inferences drawn under section 11(5) the judge 'shall' warn the accused accordingly.⁵⁰⁸
10. In considering what direction to give to the jury when the defendant has put forward a defence which is different from that advanced in the defence statement, the judge must have regard to (a) the extent of the differences; and (b) whether there is justification for it.⁵⁰⁹
11. If the accused calls an alibi witness without giving any or any adequate particulars under section 6A(2) the judge, when considering what direction to give to the jury, must have regard to whether there is any justification for the failure.⁵¹⁰
12. The judge will need to make a decision whether, if a defence statement was served, it should be admitted in evidence and a copy provided to the jury. That decision will probably depend upon whether the jury is being asked to consider the detail of the statement.

Comment or Inference

13. The first question for the trial judge is whether he is going to direct the jury that an adverse inference is available. The only significance to the jury of a breach of the defendant's obligations to make disclosure is likely to be the potential inference that a fact on which the defendant now relies is false, either because it was, without justification, advanced late, or is inconsistent with a previous account in the defence statement. In practice, therefore, the judge will need to decide whether to explain that the adverse inference is available, or, to warn the jury against drawing it.
14. In the straightforward case, where the defendant has signed the defence statement and he is now advancing a different case from that disclosed, there will be little difficulty in framing directions. Where, however, the defendant maintains that he was not responsible for the inaccuracy the judge will need to make a decision whether the issue should be left to the jury, as a pre-condition to the drawing of an inference, or to warn the jury against drawing any inference.
15. Where the defendant has failed to serve a defence statement at all, or has served it very late, the inference the prosecution is likely to seek will be similar to that sought under section 34 Criminal Justice and Public Order Act 1994, that the defendant at the material time either had not thought of his defence, or he had no defence which would stand up to examination.
16. The defendant's explanation for late disclosure or non-disclosure may be disbelieved. It may, but will not necessarily, follow that the fact which the defendant failed to disclose is not true. It may, but will not necessarily, follow that the defendant is guilty. The judge's directions as to legitimate inferences will be similar to those required for section 34 CJPOA 1994.

Footnotes

⁵⁰⁸ Section 6E(2) CPIA 1996

⁵⁰⁹ Section 11(8) CPIA 1996

⁵¹⁰ Section 11(9) CPIA 1996

Directions

The judge should discuss with the advocates, before speeches, any comment the parties propose to make and the directions he proposes to give. In *Wheeler*⁵¹¹ the defendant maintained at trial that he did not know he was importing drugs; his defence statement conceded that he did. This was a mistake admitted by his solicitors, not explored at trial, save by the defendant's unsupported assertion that a mistake had been made. In fact, the jury should have been warned not to draw an adverse inference. The Court of Appeal observed⁵¹² that unfairness could have been avoided if there had been timely discussion between the advocates and the judge.

Failure to serve a defence statement or serve it in time

Considerations will include:

- Was the defendant aware of the statutory requirement?
- Was the defendant warned at a pre-trial hearing as to the consequences of breach?
- Had the defendant given an account in interview?
- Is the case now advanced different, in any material respect, from the contents of the interview?
- If a defence statement was served late, how late?
- If a defence statement has been served late, what difference has that made to the prosecution's ability to investigate?
- What reason has been advanced for the failure to serve a defence statement in time?
- Is the reason advanced true or may it be true and, if so, does it justify or mitigate the breach?
- What inferences, in the particular circumstances revealed, may be available from the failure to serve the defence statement in time or at all?

Failure to disclose the defence advanced at trial or to disclose a fact or matter relied on at trial

Considerations will include:

- Was the defendant aware of the statutory requirement?
- Was the defendant warned at a pre-trial hearing as to the consequences of breach?
- To what extent is there a difference between the defence disclosed (or matters disclosed) in the defence statement and the defence advanced (or matters advanced) at trial?
- What reason has been advanced for the differences?
- Is the reason advanced true or may it be true and, if so, does it justify or mitigate the breach?
- What inferences, in the particular circumstances revealed, may be available from the change in the defendant's case?

Footnotes

⁵¹¹ [2001] 1 Cr App R 10

⁵¹² At §50, per Potter LJ

Failure to disclose an alibi defence or particulars of alibi witnesses

Considerations will include:

- Was the defendant aware of the statutory requirement?
- Was the defendant warned at a pre-trial hearing as to the consequences of breach?
- What was the extent of the failure to make disclosure?
- What impact has the failure had upon the prosecution's ability to meet the defence case?
- What reason has been advanced for the failure?
- Is the reason advanced true or may it be true and, if so, does it justify or mitigate the breach?
- What inferences, in the particular circumstances revealed, may be available from the failure to make any or full disclosure of the alibi?

Although section 11(5) CPIA 1996 enables the jury to draw "such inferences as appear proper" they should not be left without assistance as to the legitimate range of inferences available. This may be a sensitive exercise, particularly where there is disagreement between the defendant and his solicitor as to instructions given, or the defendant declines to waive privilege despite the statutory assumption that the defence statement has been served with authority unless the contrary is proved. Further, as with reliance on facts at trial not disclosed in interview, the embellishment on which the prosecution relies to support an inference that it is untrue may not go so far as to support an inference that the whole defence is false.

Illustration – silence in interview - defence statement served just before trial – explanations given by the defendant - inferences available from both 'failures'

The defendant was asked in interview under caution if he was in the town centre at 11 pm on the day of the incident; if he was involved in an argument with anyone; if he knew V; whether V was now going out with the defendant's ex-girlfriend; if he was carrying a knife; whether V was walking away from the argument when the defendant stabbed V twice in the side. This, of course, was information given to the police by V and his friend, A, who have both now given evidence. To each of these questions the defendant made no comment. He was charged with wounding with intent, given bail, and sent to the Crown Court for trial.

At all times since his arrest, the defendant has been represented by solicitors. The defendant's solicitors were informed before the defendant was interviewed of the nature of the evidence against him. They were then served with the witness statements on which the prosecution was relying. They included the statements of V and A.

It was the duty of the defendant to serve on the court and the prosecution, by 14 August 2009, a statement of his case in what is called a defence statement. Its purpose is to notify the court and the prosecution in good time what issue is taken with the prosecution evidence and on what facts the defendant relies in his defence. The point is that both the prosecution and the defence are obliged to put their cards on the table. Neither side is allowed to engage in trial by ambush. Their duty is to assist the court and the witnesses. A defence statement requires the defendant to say explicitly what his defence will be at trial. Furthermore, if the prosecution, on reading the document, realise that they have information which may assist the defence they are obliged to disclose it.

On 21 August the defendant appeared at this Crown Court for a plea and pre-trial hearing. As you have heard it was ineffective because the defendant had failed to attend appointments with his solicitors who wanted to take instructions from him. The defendant had no excuse to give. The hearing was adjourned for seven days. But before the court adjourned, the defendant was warned personally by the judge that if he did not lodge a defence statement within the next seven days it would be open to the jury at his trial to reach a conclusion which was adverse to him, including that he had no real answer to the charge. Even after that warning no defence statement was forthcoming. At the adjourned hearing on 28 August the defendant pleaded not guilty to the charge. His advocate told the judge he still did not have complete instructions and requested full witness orders for all witnesses except for the police officers who interviewed him. He thought the defence might be self defence but he was still not in a position to serve a defence statement. A full conference with the defendant and counsel was required before the final position was would be known. If the position changed the court would be notified. The trial was listed for Monday, October 26th and the defendant was told that if he maintained his plea the jury would be told that they could an adverse conclusion from his failure to serve a defence statement.

As you know, a final pre-hearing was held on Wednesday, 30th September and, for the first time, the defendant disclosed his defence in a defence statement served that day. You have seen it. The defendant admitted that V was wounded with a knife. He said the knife belonged to V; V drew the knife; there was a fight between them; as they were rolling on the floor and the defendant attempted to wrestle the knife from V, the knife must have entered V's body accidentally on two occasions. The defendant said that at all times he was acting in self defence and made no attempt to wound V. He has repeated this account to you in evidence.

I need to explain how the defendant's silence in interview and his failure until the last moment to disclose his defence may affect your judgement of this case.

Parliament has provided that when a defendant relies at his trial on facts which he could reasonably have been expected to mention, but did not mention, when questioned in interview you, the jury, may draw such inferences, in other words you can reach such conclusions, from his silence which you think are fair and proper. These failures can, in other words, count against the defendant at trial.

Parliament has also provided that where the defendant fails to comply with his obligation to disclose his defence in good time before trial, the jury may also reach any conclusions which they consider to be fair and proper in the circumstances.

What are the inferences or conclusions which you are invited to reach? The prosecution has suggested to you in argument that if there was any truth in the defendant's claim that it was V and not the defendant who was the aggressor, and that it was V and not the defendant who produced the knife, he would have said so at the first available opportunity and instructed his solicitors to serve a defence statement to that effect. The fact that the defence now put forward first saw the light of day during the week before the trial demonstrates that it is of recent invention and completely untrue.

Whether you reach any adverse conclusion depends primarily upon your judgement of the reasons put forward by the defendant for his failure to speak earlier than he did. Did he have any acceptable reason for not mentioning the facts on which he now relies?

Let us first consider the interview under caution. The defendant was cautioned that he did not have to say anything. That was indeed so. The defendant had a legal right to remain silent if he chose. He was also told that it may harm his defence if he failed to mention when questioned a fact on which he later relied at trial. You need to consider whether the defendant, in the circumstances in which he found himself, accused of deliberately knifing V as V was walking away from an argument, could reasonably have been expected to mention that, on the contrary, V was the aggressor, that he, the defendant, acted in self defence, and that V's wounds were not deliberately inflicted. The defendant told you he would have mentioned those things to the police but for the fact that his solicitor advised him to say nothing. Legal advice is an important consideration. However, as the defendant acknowledged, the decision was the defendant's whether to accept that advice or not. You will need to decide whether legal advice was the true reason for his silence. It is one thing if you have a genuine defence to put forward but you decide not to mention it on advice; it is another if you have no defence to put forward and use legal advice to avoid making an admission. The defendant was asked whether he was prepared to reveal what he told his solicitor about the incident and the discussion which led to the advice. He said he was not. He was not obliged to reveal what was said because the conversation was protected by legal confidentiality, but the result is you have nothing but the fact that the defendant accepted advice to explain why he chose to remain silent. If you are sure that the real and only sensible explanation for the defendant's silence was that he had no answer to the allegations put to him, or none that would stand up to scrutiny, then you are entitled to give effect to that conclusion when deciding whether he is guilty of the offence charged.

The defendant was asked why he failed to submit a defence statement when he knew it might count against him if he did not. He said he thought that the complainant would withdraw his complaint. Asked whether he had any reason to think the complaint might be withdrawn, he said he did not. He agreed that he was asked to attend appointments with his solicitors but failed to do so. There was nothing to prevent him attending. He now thought he had been burying his head in the sand. He then agreed that it was not until the day before his defence statement was served that he gave to his solicitors the information needed to complete it. You will need to consider this explanation. Did the defendant all along have a true defence to put forward but neglected out of fear or panic to do so, or is it that the defendant had not yet thought out the defence he is now putting forward? If you think the defendant may simply have been burying his head in the sand then you should not allow this failure to undermine your consideration of his evidence; but, if you are sure that his failure to respond can only be explained by the absence of any true defence then, of course, it is bound to affect adversely your judgement of his evidence.

It is for you to decide whether the defendant's silence in interview and his failure to disclose his defence should count against him in the way I have explained. You should only reach this conclusion if you are sure it is fair and proper to do so. You must be sure that the prosecution case was sufficiently strong to require an answer; that the defendant could reasonably have been expected to mention the facts and matters on which he now relies; and that the only sensible explanation for his failure is his realisation that he then had no answer to give or none that would stand up to scrutiny. Remember that you must not convict the defendant unless you are sure he was not acting in self defence. You should not convict just because or even mainly because the defendant has come to court late with his account. His failure to mention self defence on any earlier occasion is a factor which you are entitled to consider when deciding who has told the truth.

Illustration – failure to mention when questioned and failure to include in the defence statement a fact now relied on in evidence – inferences available from both failures

When the defendant was asked questions on behalf of the prosecution it emerged that well before trial there was served, by his solicitors on his behalf, what is called a defence statement. This is a document which the defendant is required to serve on the court and prosecution, setting out where he takes issue with the prosecution evidence and the facts on which he relies in his defence. The purpose of the defence statement is to ensure that both sides come to court aware of the matters in dispute and that the prosecution can be sure that it has disclosed everything which may be relevant to the defence. You have seen the defence statement. In it, he admitted using violence upon V, but said that the reason he did so was because V was being aggressive and the defendant thought he was about to be assaulted. In other words, the defendant was giving notice that his defence was self defence. The terms of the statement were in essence repeating what the defendant had said during his interview under caution.

In evidence, when being questioned by his own advocate, the defendant was asked, "Why did you punch V?" The defendant replied, "Because I thought he was going to stab me". He was asked "What made you think that?" He replied, "He took out a knife and pointed it at me."

Now this was the first time the defendant claimed that V had a knife and that it was the knife which caused him to react as he did. In his interview and in his defence statement the defendant had said that V made a movement towards him which caused him to think he was about to be assaulted. The prosecution has suggested to you in argument that, if there was any truth in the assertion that V threatened the defendant with a knife, he would have said so when he was interviewed and he would certainly have mentioned it in his defence statement.

I need to explain to you how the late emergence of this evidence may affect your judgment of the defendant's case.

First, consider the interview. The defendant was told he need not say anything. That indeed was his legal right, but in this case the defendant elected to give an account which included a claim that he acted in self defence. He was also told that it may harm his defence if he failed to mention when questioned something on which he later relied at trial, and that whatever he did say may be used in evidence. You will need to consider the question whether the defendant could reasonably have been expected to mention in interview the fact that he thought he was about to be attacked with a knife. Given what the defendant was telling the police, was the existence of a knife a relevant fact? Was there any sensible reason for not mentioning it? The defendant was asked about this on behalf of the prosecution. His first response was that he was not asked the question which might have elicited the answer. It was pointed out to him that after he claimed he was frightened of V, he had been asked, "What were you afraid of?" He replied, "His size". The defendant told you that he was in a bit of a panic in the interview and he must have forgotten to mention the knife. You will therefore need to reach a decision what was the real reason why the knife was not mentioned. Was it confusion or panic or forgetfulness? Or was it because the defendant had not yet thought to embellish his account by inventing the knife?

Second, consider the defence statement. The defendant accepted that before the defence statement was prepared he had an interview with his solicitor at his office. They went through the prosecution witness statements. The defendant made comments. The solicitor dictated a witness statement as they went along. From the witness statement the solicitor drafted a defence statement which he then read over to the defendant, who approved it. The defendant signed the draft and the solicitor was left to sign the final version. The defendant told you that he thought he had mentioned the knife to his solicitor. Counsel for the prosecution then called for the production of the draft. It was produced from the solicitor's file in court. The defendant compared the two and conceded that they were identical apart for the correction of grammar and the addition of a title and some paragraph numbers. Asked to explain, the defendant said he must be mistaken but he had always intended to mention the knife. The defendant agreed that he felt under no particular pressure at his solicitor's office. He knew the purpose of his witness statement and the defence statement because the solicitor explained. Counsel for the defendant acknowledged that the defendant's witness statement was in court but did not suggest that its terms were in this respect any different from the defence statement. The defendant gave evidence that he had a conference with counsel on the morning of the trial and he then gave the account which he has given you. What was the reason why the knife was not mentioned in the defence statement? What was its importance? Could the defendant have forgotten to mention it or was it not mentioned because the defendant had not yet thought of it?

You should only reach a conclusion that the defence put forward is a recent invention if you are sure it is the fair and proper thing to do. It certainly would not be fair and proper to do so unless you were sure that the prosecution case called for an answer from the defendant; that, if it was true V had a knife, the defendant could reasonably have been expected to mention it long before the trial; and that the only sensible explanation for his failure is that it is not true.

Finally, what are the inferences or conclusions which are available to you? Plainly, the first and most obvious is that the claim in evidence by the defendant that V was in possession of and threatening the defendant with a knife is false. But, does that conclusion cause you to reach the further conclusion that the defendant did not honestly believe that he needed to defend himself? You will recall that after V and A had been cross-examined, and they had denied that V was in possession of a knife, counsel for the prosecution asked each of them in re-examination whether V had made any aggressive movement towards the defendant. They both said he had not. The defendant has abandoned what he said in interview which, the witnesses say, is, in any event, untrue. If, therefore, you conclude that V had no knife, the only evidence left to support a claim that the defendant had reason to defend himself comes from the interview which is abandoned. That, however, is your decision. As you know, the prosecution must make you sure on all the evidence, including what he said in interview, that the defendant was not acting in self defence.

Illustration – failure to give particulars of alibi and alibi witnesses – inferences available – possibility that alibi is true but particulars are untrue

During his interview under caution on 14 July 2009 the defendant told the officers that he was elsewhere when the offence took place. Asked where he was, the defendant said he could not recall with any certainty, but he thought he would have been either with his girlfriend at home or with a mate having a drink. The defendant gave to the court and the prosecution written notice of his alibi

in a defence statement.⁵¹³ In it the defendant repeated what he had said in interview. He did not, however, name any person who might be able to give evidence in support of that alibi, either his girlfriend or any friend with whom he may have been drinking. This matter was raised at a pre-trial hearing, at which the defendant was present, on 25 September 2009. The judge asked the defendant's advocate why there was no mention of an alibi witness in the statement. He was informed that the defendant was still unable to give instructions whether, on the night of the incident, he was at home or out drinking. The judge said this:

"It may be that the defendant is unable to recall where he was on the night of 6 June 2009 in which case the notice of alibi he has provided cannot be improved. If, however, he proposes to rely on the evidence of any witness in support of his alibi, he must give particulars of that witness or those witnesses. If the defendant seeks to call evidence in support of his alibi at trial without having given notice as required under the 1996 Act the jury may consider drawing an inference adverse to his case. The conclusion the jury may be invited to reach is that the evidence of alibi is not true."

The defendant was asked whether he understood and he replied that he did.

The court heard nothing more from the defence until 10 weeks later, that is 15 days ago. A letter was received from the defendant's solicitors notifying the court and the prosecution that the defendant now proposed to rely on an alibi that he was away camping and fishing for the weekend of 6 and 7 June 2009 with his friend X, whose details were given in the letter. The prosecution submits that if this alibi is true there is no good reason why the defendant should not have been able to remember and give particulars of it when arrested. The defendant's failure, until 2 weeks ago, to provide particulars of his alibi is evidence that it has been concocted together with X to provide him with a specious answer to the prosecution case.

The question therefore arises whether you should consider drawing an inference adverse to the defendant's case.

You should first examine the reason given by the defendant for the lateness of these particulars of alibi. He told you that he had made a mistake in his recollection. His girlfriend told him she could not remember what they were doing. He realised he had got his weekends mixed up when he was chatting with X in the pub three weeks ago. X reminded him that they had been fishing together that weekend. X, when he gave evidence, said something different. He told you that the defendant texted him to meet him in the pub about his forthcoming court appearance. At the pub it was the defendant who asked whether X remembered the fishing trip. He said he did. X went to the defendant's solicitor to support the alibi.

Footnotes

⁵¹³ He may not have been required to give notice of alibi at this stage – see *Johnson* [1995] 2 Cr App R 1 in which the Court of Appeal held that the notice was required only if the defendant was relying upon the assertion that he was in a particular place other than the scene of the alleged crime. Section 11(8) Criminal Justice Act 1967 was in the same terms as section 6A(3) CPIA 1996. Glidewell LJ said:

"In our judgment, evidence, whether from a defendant himself or from any other person, which goes no further than that the defendant was not present at the place where an offence was committed is not "evidence in support of an alibi" within section 11(8) and thus within the remainder of the section. By the clear words of subsection (8), evidence in support of an alibi has to be evidence that the defendant was at some other particular place, or in some other particular area. If, as we are told, there is any doubt about the proper interpretation of section 11(8), that doubt, we hope, can now be stilled."

If you conclude that the defendant may genuinely have forgotten that he had been away fishing with X on the weekend of 6 June, then you could not hold his failure to mention it against him. If, on the other hand, you are sure that his explanation of forgetfulness is false, it is open to you to conclude that the only sensible reason for it is that this evidence of alibi is of recent invention. You should reach such a conclusion only if, having considered the evidence of the defendant and X with care, you are sure that it is fair and proper to do so. If you do conclude that the alibi is false, that is not enough to prove the prosecution case. A defendant may construct an alibi for reasons which do not necessarily imply guilt, such as a belief that it is easier to say "I wasn't there" than to tell the truth. Furthermore, you need to examine the possibility that the defendant was telling the truth when he said he was not present, but lying when told you he went fishing, because he could not prove where he really was at the time of the attack on V. While a false alibi may damage the defence the burden remains on the prosecution to prove the defendant's guilt so that you are sure.

Sources

Archbold 12-56/64; Blackstone D9.18/24

(8) Defendant's Silence at Trial

Introduction

By section 35(2) Criminal Justice and Public Order Act 1994 the jury may draw an inference adverse to the defendant from his failure to give evidence at his trial.⁵¹⁴

The qualifying conditions are ⁵¹⁵:

1. The defendant's guilt is in issue;
2. It does not appear to the trial judge that the physical or mental condition of the defendant makes it undesirable for the defendant to give evidence ⁵¹⁶;
3. The trial judge has satisfied himself in the presence of the jury that the defendant was aware that:
 - (i) the stage had been reached at which evidence could be given for the defence;
 - (ii) he could if he wished give evidence;
 - (iii) if he chose not to give evidence or, having been sworn, without good cause, refused to answer questions it would be permissible for the jury to draw such inferences as appear proper;
4. The defendant declined to give evidence or refused, without good cause ⁵¹⁷, to answer questions.

The Consolidated Criminal Practice Direction gives guidance on the application of section 35(2) as follows:

DEFENDANT'S RIGHT TO GIVE OR NOT TO GIVE EVIDENCE

If the accused is legally represented

(IV.44.2) Section 35(1) provides that section 35(2) does not apply if at the conclusion of the evidence for the prosecution the accused's legal representative informs the court that the accused will give evidence. This should be done in the presence of the jury. If the representative indicates that the accused will give evidence the case should proceed in the usual way.

(IV.44.3) If the court is not so informed, or if the court is informed that the accused does not intend to give evidence, the judge should in the presence of the jury inquire of the representative in these terms: 'Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so?'

Footnotes

⁵¹⁴ For the full section see Archbold 4-305; Blackstone F19.20

⁵¹⁵ Section 35(1), (2), and (5) CJPOA 1994

⁵¹⁶ See *Friend* [1997] 1 WLR 1433, [1997] 2 Cr App R 231; A [1997] Crim LR 883; *Kavanagh* [2005] EWHC 820 (Admin) – medical evidence will almost certainly be required. In assessing whether it is 'undesirable' the judge is entitled to weigh the likely significance of the defendant's evidence to the issues in the case with the nature and consequences of the mental condition revealed by the expert evidence – *Tabbakh* [2009] EWCA Crim 464

⁵¹⁷ The defendant is, by section 35(5) CJPOA 1994, to be taken to have refused to answer without due cause unless he is entitled, by virtue of any other enactment or on the ground of privilege, to answer, or, the trial judge excuses him from answering under his general discretion

(IV.44.4) If the representative replies to the judge that the accused has been so advised, then the case shall proceed. If counsel replies that the accused has not been so advised, then the judge shall direct the representative to advise his client of the consequences set out in paragraph IV.44.3 and should adjourn briefly for this purpose before proceeding further.

If the accused is not legally represented

(IV.44.5) If the accused is not represented, the judge shall at the conclusion of the evidence for the prosecution and in the presence of the jury say to the accused:

“You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?”

Section 35(2) is mandatory. The jury may not draw an adverse inference from a failure to give evidence unless the trial judge has asked the relevant questions of the defendant or his advocate, even if the defendant has deliberately absented himself from the trial, thus putting it beyond the power of defence advocate to obtain instructions.⁵¹⁸

It is the defendant’s advocate’s duty to ensure that the defendant understands advice as to whether he should give evidence or not and that a written record is made, signed by the defendant, acknowledging his wish not to give evidence.⁵¹⁹

A conviction should not be based solely upon the defendant’s failure to give evidence.⁵²⁰

No inference can be drawn where the facts adduced by the prosecution are unchallenged and the only issue remaining is whether they amounted to the offence charged.⁵²¹

Inferences Available

The jury must be satisfied that there is a case to answer before they draw an adverse inference.⁵²² But, the effect of a lack of evidence from the defendant will usually be that the prosecution evidence is unchallenged. The jury need not resolve disputed issues of fact before concluding there is a case to answer.⁵²³

The nature of the inference available will depend on the way in which the evidence has developed and the strength of the prosecution case. The stronger the case the more powerful the incentive to provide an answer, if there is one.

Footnotes

⁵¹⁸ *Gough* [2002] 2 Cr App R 121, [2001] EWCA Crim 2545

⁵¹⁹ *Bevan* [1994] 98 Cr App R 354; *Chatroodi* [2001] EWCA Crim 585 at §39

⁵²⁰ Section 38(3) CJPOA 1994. Note the addition of the words ‘or mainly’ in ‘failure to mention’ section 34 CJPOA 1996 cases: *Petkar* [2004] 1 Cr App R 270, [2003] EWCA Crim 2668.

⁵²¹ See *McManus* [2001] EWCA Crim 2455

⁵²² *Cowan* [1996] QB 373, [1995] 3 WLR 818, [1996] 1 Cr App R 1

⁵²³ Note the observations of Pill LJ in *Whitehead* [2006] EWCA Crim 1486 at §48. The evidence for the prosecution must be ‘sufficiently cogent to call for an explanation’ before the considering the inference of guilt

In the Northern Ireland appeal in *Murray v DPP*⁵²⁴, Lord Slynn offered the following analysis:

“...if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt. On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.”

Lord Taylor CJ in *Cowan*⁵²⁵ said:

“The effect of section 35 is that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond reasonable doubt.”

Directions

In *Cowan*⁵²⁶ Lord Taylor CJ described the essential elements of directions to the jury as follows:

1. The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is.
2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains.
3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.
4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a *prima facie* case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.
5. If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.
 - The question whether a section 35 direction should be given and in what terms should be discussed with the advocates before speeches. The defence might well be reminded of the rule that no reason may be advanced to the jury for the defendant's decision not to give evidence without evidence to support it.⁵²⁷ Equally, if the judge concludes that no adverse inference is fairly and properly available, the jury should be explicitly directed.⁵²⁸

Footnotes

⁵²⁴ [1994] 1 WLR 1 at page 11

⁵²⁵ At Cr App R page 5

⁵²⁶ At Cr App R page 7

⁵²⁷ *Cowan* at page 9: “Finally, we wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context. It cannot be proper for a defence advocate to give to the jury reasons for his client's silence at trial in the absence of evidence to support such reasons.”

⁵²⁸ *McGarry* [1999] 1 WLR 1500, [1999] 1 Cr App R 377, a case under section 34

- In the majority of cases there will be specific issues raised by the evidence for the prosecution, either the truth of the facts asserted or the conclusion to be reached from circumstantial evidence. The immediate inference available for the jury from the defendant's choice not to give evidence is that the defendant has no answer to give and, accordingly, that the fact or the conclusion, as the case may be, is true. However, it may not follow that a legitimate adverse inference *must* imply guilt and, where it does not, the jury will be assisted by an explanation to that effect.
- It may be, for example, that the defendant's silence will support the prosecution's case that he participated in relevant acts. It may or may not, depending on the jury's view, support the prosecution case as to his specific intent.
- Where the defendant has given an explanation in a written statement or during interview under caution the jury should consider it as evidence of the truth of its contents. Where the defendant relies upon an interview which consists partly of admission and partly of denial or explanation, discussion with the advocates may be required to identify which parts of the interview are self serving. The judge may make legitimate comment to the effect that a self serving statement was not made under oath and has not been tested by cross-examination.⁵²⁹ In the rare case when the statement is *wholly* exculpatory it is admissible as evidence of the defendant's reaction when first challenged but not in proof of the matters stated.⁵³⁰ Whether the statement is wholly exculpatory should be judged against the real issues as they appear at trial.⁵³¹

In *Hamidi and Cherazi*⁵³² one of the accused absented himself from trial at the outset. In his case the section 35 direction could not be given; on the contrary, the jury were given the conventional direction that they should not speculate about the reasons for his absence and should not hold it against him. The appellants, who were present throughout the trial, elected not to give evidence. In their cases the section 35 direction was given. Their argument on appeal that their treatment was unfair by comparison with that of the absent accused, and that the jury should have been directed not to draw any inference from silence, was unsuccessful. The position might have been different if there had been a significant overlap in the cases of the appellants and the absent accused.

Footnotes

⁵²⁹ *Duncan* [1981] 73 Cr App R 359 (CACD) approved in *Sharp* [1988] 1 WLR 7 (HL) and *Aziz* [1996] AC 41 (HL)

⁵³⁰ *Garrod* [1997] Crim LR 445, [1996] EWCA Crim 1149

⁵³¹ *Papworth and Doyle* [2007] EWCA Crim 3031 at §13-15

⁵³² [2010] EWCA Crim 66

Illustration – wholly self serving statement - advocate advancing reason for silence – relevance of self serving statement – prosecution evidence not contradicted - availability of inferences

The defendant has been identified by two witnesses as being present at and taking part in the attack upon V. His case, as advanced through questions put to those witnesses in cross-examination, is that they are mistaken. I have explained the care with which you should approach evidence of identification. In his interview under caution the defendant denied being present. He said he could not recall where he was but he certainly was not present when the incident took place.

The defendant has chosen not to give evidence in support of his defence. I need to explain how this is relevant to your consideration of the case.

(2)⁵³³ You must remember that the defendant has a perfect right not to give evidence and to require the prosecution to prove its case. (3) You cannot jump to the conclusion that his silence proves the case against him. It does not. (1) The burden remains on the prosecution to prove its case so that you are sure.

However, the defendant's silence is relevant to your consideration of the case in two respects:

First, there is no evidence before you capable of contradicting, undermining or explaining the evidence for the prosecution. Although what the defendant said in interview is evidence of his reaction when first challenged by the police, it is not capable of being evidence that he was elsewhere at the time of the attack on V.⁵³⁴ It is simply an assertion made by the defendant on an occasion when he was not giving evidence.

Second, his decision not to give evidence may, depending on your view, add weight to the prosecution case. You will recall that I asked defence counsel in your presence whether the defendant understood that if he did not give evidence you, the jury, may draw such inferences as appear proper. In other words, it is open to you to conclude that the reason why the defendant has remained silent is that he has no answer to the prosecution case or none that would stand up to examination.

Defence counsel put forward a reason why you should not hold the defendant's silence against him. He suggested to you that if the defendant could not, when interviewed, remember where he was at the relevant time he is unlikely to be able to assist you now. I need to point out two things: First, counsel cannot advance reasons for the defendant's silence without evidence in support. This is a suggestion unsupported by evidence. Second, counsel's argument makes an assumption that what the defendant asserted in interview was true. That, however, is the very question which you have to decide - whether the defendant was present or not. The defendant could, if he wished, have given evidence that he was not present and, if he had, it would have been exposed to examination.

The defendant chose not to give evidence and it is open to you to reach a conclusion adverse to his case. It is your decision whether it is the fair and proper conclusion to reach. It is one you should reach only if (4) you regard the prosecution case as sufficiently strong to require an answer from the defendant, and (5) you are sure that the only sensible explanation for his silence is his awareness that he has no answer, or none that would bear examination.

Footnotes

⁵³³ Reference to the Cowan directions

⁵³⁴ Because it is wholly self serving

Illustration – effect of admissions and explanations in mixed statement – inferences available

The defendant has chosen not to give evidence in his own defence. I need to explain how that choice is relevant to your consideration of the case.

(2)⁵³⁵ You must remember that the defendant has a perfect right to remain where he is and to require the prosecution to prove its case. (3) You cannot jump to the conclusion that his silence proves the case against him. It does not. (1) The burden remains on the prosecution to prove its case. That obligation means the prosecution must prove so that you are sure that the defendant did not act in lawful self defence.

However, the defendant's silence is relevant to your consideration of the evidence in two respects:

First, there is no oral evidence before you capable of contradicting, undermining or explaining the case for the prosecution. The defendant did, however, give an account to the police on which his advocate has placed a good deal of emphasis. In it, the defendant admitted using violence on V but he said he did so because he was in fear of an attack from V. In other words, the defendant claimed that he was acting in self defence. The defendant's interview is admissible in evidence and you must consider what he then said with care. However, I need to point out two things for you to consider: V has now given evidence, as has an independent bystander, Mr A. The account given by the defendant in interview has been put to both of them and you will recall the terms in which they rejected it. Their evidence remains uncontradicted by evidence on oath, tested by cross examination. Furthermore, you may conclude that while the defendant's acceptance in interview of his involvement in violence is an admission against his own interest and, for that reason, likely to be true, his claim to have been acting in self defence is controversial and, for that reason, to be treated with more circumspection. These are my observations for you to consider. Whether you agree or disagree with them you must decide.

Second, the defendant's decision not to give evidence may, depending on your view, add weight to the prosecution case. You will recall that I asked defence counsel in your presence whether the defendant understood that if he did not give evidence you, the jury, may draw such inferences as appear proper. What inference or conclusion might be available? It is one thing, perhaps, to advance a case of self defence by cross-examination of the victim and a witness, and through the contents of a police interview with the police, but another to give evidence on oath or affirmation and to expose it to examination. In other words, it is open to you to conclude that the reason why the defendant has remained silent at his trial is that in truth he has no answer to the prosecution case or none that would stand up to examination.

I have said it is open to you. It is your decision whether it is the fair and proper conclusion to reach. It is one you should reach only if (4) you regard the prosecution case as sufficiently strong to require an answer from the defendant, and (5) you are sure that the only sensible explanation for his silence is his awareness that he has no answer, or none that would bear examination.

Sources

Archbold 4-305/306, 4-398/399, 15-400/407; Blackstone F19.19/28, F17.61/65

For observations by the trial judge on the failure to call a witness see Archbold 4-400; Blackstone F19.30/31. See also Shakeel Khan [2001] EWCA Crim 486; Campbell (Jason) [2009] EWCA Crim 1076.

For drawing an adverse inference from a failure to provide an intimate sample see section 62(10) PACE 184, Archbold 15-235/236; Blackstone F19.29

Footnotes

⁵³⁵ Reference to the Cowan directions

CHAPTER 16: DEFENCES

(1) Alibi

Introduction

1. For the purposes of disclosure in a defence statement, evidence of alibi is, by section 6A(3) Criminal Procedure and Investigations Act 1996:

“evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”

2. In *Johnson*⁵³⁶ the Court of Appeal considered the meaning of identical words in section 11(8) Criminal Justice Act 1967, the predecessor to the defence disclosure provisions of the 1996 Act. Glidewell LJ, giving the judgment of the court said⁵³⁷:

“In our judgment, evidence, whether from a defendant himself or from any other person, which goes no further than that the defendant was not present at the place where an offence was committed is not “evidence in support of an alibi” within section 11(8) and thus within the remainder of the section. By the clear words of subsection (8), evidence in support of an alibi has to be evidence that the defendant was at some other particular place, or in some other particular area. If, as we are told, there is any doubt about the proper interpretation of section 11(8), that doubt, we hope, can now be stilled.”

3. The requirements of disclosure in the defence statement under the 1996 Act include, under section 6A, his defence, the matters on which the defendant takes issue with the prosecution and (since November 2008) particulars of facts on which he intends to rely in his defence. If, therefore, the defendant’s case is that he was not present at the time of the alleged offence, his obligation is to disclose that assertion, even if he is unable to advance a defence that he was at some other particular place or area.⁵³⁸
4. Whenever the defendant’s case is that he was not present at the scene of the crime, whether he asserts that he was at some other particular place or area or not, the burden is on the prosecution to prove that he committed the offence. Thus, the judge’s directions to the jury do not necessarily depend on whether a specific assertion as to his whereabouts is made, rather on whether:

(1) he has given late notice of his defence (sections 5 and 11 CPIA 1996),

(2) he is now relying on a fact which he failed to mention when questioned or charged (section 34 CJPOA 1994) and/or

(3) he has lied in his assertion that he was elsewhere at the time of the offence.

Footnotes

⁵³⁶ [1995] 2 Cr App R 1

⁵³⁷ At page 9

⁵³⁸ See Chapter 15 Defendant’s Statements and Behaviour (7) Failure of Defendant to Make Proper Disclosure of Defence Case

5. Just as in the cases of late disclosure, failure to mention when questioned, and lies, the judge will need to identify for the jury the legitimate inferences. It does not necessarily follow that if the alibi is false the defendant has no defence. The prosecution evidence may, for example, reveal evidence of self defence or, in a trial for murder, provocation.

Directions

The first requirement of the direction to the jury is that they understand there is no burden on the defendant to prove that he was elsewhere. The prosecution must prove its case and that includes the need to prove that the defendant committed the offence.

The second is to guard against the danger that if the jury disbelieve the defendant's alibi, whether it is a mere denial of presence or a positive assertion that he was elsewhere, they might assume he is guilty. The risk was succinctly put by Lord Morris of Borth-y-Gest in *Broadhurst*⁵³⁹, a case which did not involve alibi but alleged lies in evidence :

"It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so."

Particular care is required when the contest is between identifying witnesses and the evidence of alibi. In the leading authority on identification evidence, *Turnbull*⁵⁴⁰, Lord Widgery C.J. said:

"Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates on occasions, like other witnesses can. It is only when the jury is satisfied that the whole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness said he was."

Thus, the warning should be given whenever there is a risk that the jury will, having rejected the alibi, assume guilt of the offence charged.

In *Baillie*⁵⁴¹ the defendant, having shot his victim, went to the home of a friend and tried to persuade him to support him in a false alibi. At trial, the defendant accepted that he was the gunman but said that he was acting under provocation. The Court of Appeal held that the jury should have been warned against the risk of assuming the defendant's guilt of murder (rather than manslaughter) from his willingness to fabricate an alibi. The Court applied the reasoning expressed by Lord Taylor CJ in *Richens*⁵⁴² as follows:

Footnotes

⁵³⁹ [1964] AC 441 at page 457

⁵⁴⁰ (1976) 63 Cr.App.R. 132, at page 139, [1977] Q.B. 224 at page 230

⁵⁴¹ [1995] 2 Cr App R 31

⁵⁴² [1994] 98 Cr App R 43 at page 50

".....the jury were being invited to consider as potentially probative of the Crown's case of murder and as justifying the rejection of the appellant's account of provocation, the facts that (i) he had tried to conceal his crime; (ii) he had lied about his involvement; and (iii) he had lied about his reasons for trying to cover up, and lying about, his involvement.

This approach appears to us to overlook the vital and incontestable fact that a man who has killed by reason of loss of self-control, and therefore faces arrest, trial and possible lengthy imprisonment, may have almost as strong a reason for attempting to conceal his deeds and lie about his involvement as a man who has killed deliberately."

It is not in every case that the second limb of the direction will be essential. Where, for example, on the particular facts, the inevitable conclusion is that the jury must have rejected the alibi only because the prosecution proved its case, the Court of Appeal will not interfere.⁵⁴³ However, whenever there is scope for the rejection of the alibi as a finding of fact logically independent of a conclusion of guilt, the direction should be given.⁵⁴⁴

Illustration – alibi defence – witness called on defendant's behalf - alternative counts

The defendant's defence is alibi. He says he was not present at the attack on V and that the evidence of A and B, who both identify him as the attacker with the knife, is mistaken. While the defendant has put forward the defence of alibi, the burden of the proving the case against him remains on the prosecution. The prosecution must prove so that you are sure that the defendant was correctly identified and, therefore, that his alibi is untrue.

The defendant has given evidence and has called a witness, C, to support his assertion that at the time this attack took place, he was a mile away walking with C between public houses. Both the defendant and C were cross-examined about the alibi and you are invited by the prosecution to conclude that they were lying.

If you conclude that the defendant's alibi is true or may be true, then he cannot have participated in the attack on V and you must find him not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the defendant's alibi is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false the defendant must be guilty. You should bear in mind that sometimes an alibi is invented because the defendant thinks it is easier than telling the truth. The main question for you to answer is: are we sure that A and B have correctly identified the defendant as the man who wounded V?

If you are sure that the defendant was correctly identified by A and B, the question remains whether the defendant wounded V with intent to cause him really serious injury. If you are sure he had that

Footnotes

⁵⁴³ See *Harron* [1996] 2 Cr App R 257 - Where evidence of witnesses for the Crown proving guilt was in direct and irreconcilable conflict with the evidence of the defendant and his witnesses the jury had, as a matter of logic, to decide which witnesses were telling the truth. If they accepted the prosecution evidence that necessarily involved a conclusion that the defence evidence was untrue and that the defendant was therefore lying.

⁵⁴⁴ *Anderson* [1991] Crim LR 361; *Lesley* [1996] 1 Cr App R 39

intent you would convict him of count 1. If you are not sure the defendant had that intent you would convict him of count 2. When considering whether the prosecution has proved the defendant's intent, you are entitled to bear in mind all relevant circumstances, including your rejection of the defendant's evidence, but remember that a man who has wounded another with a knife may have an incentive to make up an alibi whether he intended to cause serious harm or not. Provided you proceed with caution, it is for you to decide what weight and significance to give to the false alibi.

Illustration – alibi defence which can only be disproved by evidence of identification – alternative counts

The defendant's case is that he was elsewhere when this offence was committed. As I have told you, the fact that the defendant has given evidence does not imply that he bears any burden of proving his case. The burden remains on the prosecution to prove his guilt so that you are sure. Here the prosecution relies upon the evidence of V himself to prove that the defendant was his attacker and, therefore, that the defendant's alibi is false. V and the defendant are known to one another. The defendant admits that there have been unfriendly confrontations between them on previous occasions.

You should first examine the possibility that V may have made a genuine but mistaken identification of the defendant. If you think that is so, or may be so, then you should find the defendant not guilty. If, on the other hand, you conclude that there is no room for mistake, then common sense dictates that either V or the defendant is not telling the truth. Only if you are sure that V has given truthful and accurate evidence should you find the defendant guilty of either count 1 (grievous bodily harm with intent) or count 2 (inflicting grievous bodily harm).

If you are sure that the defendant was V's attacker, then in considering the defendant's intent you are entitled to take into account your finding that the defendant has lied to you about his alibi. What weight and significance you attach to the false alibi is for you to judge. You should, however, bear in mind it does not follow that just because he denied being V's attacker the defendant must have intended to cause V really serious harm. You should judge the defendant's intent from all the relevant circumstances. Those circumstances comprise, mainly, the nature of the attack and the injuries suffered by V.

Sources

Archbold 4-383, 4-402/402a; Blackstone D16.14/16, D17.33

(2) Self-Defence and Related Issues

Introduction

1. By section 3(1) Criminal Law Act 1967:

“A person may use such force as is reasonable in the circumstances in the prevention of crime,⁵⁴⁵ or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.”

2. By section 3(2):

“Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.”

3. Force used in self defence will usually be force used in prevention of crime since the object of self defence is to prevent an unlawful attack or a continuation of an unlawful attack on oneself, but cases of self defence are almost never justified, except by police officers, as ‘the prevention of crime’ since it is the common law that reasonable force may be used in defence of oneself.⁵⁴⁶
4. The law of self defence and defence of another⁵⁴⁷ is now reflected in section 76 Criminal Justice and Immigration Act 2008. The section applies to any trial following arraignment taking place after 14 July 2008. Section 76 provides:

“(1) This section applies where in proceedings for an offence—

- (a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within subsection (2), and
- (b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.

(2) The defences are—

- (a) the common law defence of self-defence; and
- (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

Footnotes

⁵⁴⁵ The public international law crime of war of aggression is not a crime incorporated into domestic law prevention of which provides a defence to charges of criminal damage or aggravated trespass; even if it were the use of criminal acts to prevent it would be unlawful: *Jones and others* [2006] UKHL 16.

⁵⁴⁶ *Duffy* [1967] 1 QB 63

⁵⁴⁷ For defence of property see below

- (4) If D claims to have held a particular belief as regards the existence of any circumstances—
- (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
 - (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—
 - (i) it was mistaken, or
 - (ii) (if it was mistaken) the mistake was a reasonable one to have made.
- (5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.
- (6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.
- (7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—
- (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
 - (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.
- (8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).
- (9) This section is intended to clarify the operation of the existing defences mentioned in subsection (2).
- (10) In this section—
- (a) "legitimate purpose" means—
 - (i) the purpose of self-defence under the common law, or
 - (ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);
 - (b) references to self-defence include acting in defence of another person; and
 - (c) references to the degree of force used are to the type and amount of force used."

Honest belief in the need to use force

5. The first requirement of the plea of self defence is that the defendant honestly believed that it was necessary to use force in defence of himself (or another). In *Williams (Gladstone)*⁵⁴⁸ Lord Lane CJ described the relevance of the defendant's belief as follows:

Footnotes

⁵⁴⁸ [1984] 78 Cr App R 276 at page 281

“In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.”

6. This formulation of the test was approved by the Privy Council in *Beckford*⁵⁴⁹. Lord Griffiths said:

“In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.

Their Lordships therefore conclude that.....the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.”

7. Section 76(4)(a) follows the common law in providing that the issue whether the belief was reasonable is different from the issue whether the belief was held. In deciding whether the defendant did believe or may have believed that it was necessary to use force to defend himself the reasonableness of the belief is relevant but not decisive. Thus (section 76(4)(b)), if the defendant honestly but mistakenly believed that it was necessary to defend himself he was, in using force upon V, acting lawfully.
8. Many cases of self defence are resolved by the jury against the defendant on the simple finding that it was the defendant who was the aggressor and, accordingly, that he did not believe that it was necessary to use force to defend himself.
9. However, the fact that the defendant was the initial aggressor does not necessarily deprive him of the defence. The defendant may have approached V with the intention of delivering, and in fact delivering, a salutary blow. If the response from V was to launch an attack on the defendant, the defendant may honestly believe that it was necessary to use further force in defence of himself. The same could not be said, however, if the jury was sure that the defendant was a bully whose intention was to provoke a response from V which would clothe the defendant with a spurious excuse to inflict further violence on V. The jury will need to examine the circumstances, with the assistance of the trial judge, in order to assess what the defendant’s state of mind really was.⁵⁵⁰
10. A person who believes he is in imminent danger of attack does not have to await the first blow before responding. He can take pre-emptive action to prevent the attack.⁵⁵¹ But if he is aware that a warning would suffice to prevent the attack, he does not believe that he needs to use force.

Footnotes

⁵⁴⁹ [1988] AC 130 (PC) at page 145

⁵⁵⁰ *Burns v HM Advocate* [1995] SLT 1090; *Rashford* [2005] EWCA Crim 377; *Harvey* [2009] EWCA Crim 469

⁵⁵¹ *Beckford* [1988] AC 130 at page 144

Belief held in drink

11. If the defendant claims to have believed that it was necessary to defend himself, but the jury is sure that the belief, if he may have held it, was induced by voluntary intoxication, the defendant cannot rely on it (section 76(5)). In this respect also section 76 follows the common law.⁵⁵²
12. A belief held in drink should, however, be distinguished from an intention held in drink. If self-defence is not available to the defendant because his belief was induced by drink, the prosecution must, where necessary, still prove a specific intent, such as an intent to kill or to cause grievous bodily harm.⁵⁵³

Reasonableness of force used

13. If the jury consider that the defendant did or may honestly have believed that it was necessary for the defendant to defend himself, they will reach the second limb of the common law test which is whether the force used was reasonable in the circumstances. Section 76(6) provides that the force used by the defendant was unreasonable if it was disproportionate in the circumstances as the defendant believed them to be.⁵⁵⁴ The jury is required to exercise an objective judgement whether the force used was reasonable in the circumstances (which will include the nature of the danger he faced) as the defendant understood them. Again, a mistaken understanding of the circumstances can be relied upon by the defendant unless the jury is sure his mistake was induced by voluntary intoxication (section 76(4) and (5)).
14. In judging whether the defendant's response was reasonable the jury should take into account (section 76(7)): (a) that a person acting in defence of himself may not be able to judge exactly the measure of response required; and (b) if the defendant only used force which he honestly and instinctively thought was necessary, that would be powerful evidence that his response was reasonable.

Defence of another and force used in prevention of crime and in making an arrest

15. Section 76 applies suitably adapted to the circumstances.

Defence of Property

14. At common law a householder is entitled to use reasonable force in defence of his property. In *Hussey*⁵⁵⁵ the Court of Criminal Appeal quashed a conviction for unlawful wounding when the trial judge, while leaving self defence as an issue for the jury, had failed to leave to the jury the issue of defence of property. The relevant distinction between the two defences was that in 1925 self defence required the defendant to retreat if he could, while defence of property did not, since that would be tantamount to surrendering his property to his adversary. The defendant's landlord sought forcibly to regain possession of a room from the defendant without giving due notice. From inside the room, the defendant discharged a firearm at the door which was being broken down by the landlord and her accomplices. It is to be noted that the court did not hold that use of a firearm in such circumstances was reasonable, only that the defence should have been left to the jury.⁵⁵⁶

Footnotes

⁵⁵² *O'Grady* [1987] QB 995, 85 Cr App R 315; *Hatton* [2006] 1 Cr App R 16, [2005] EWCA Crim 2951

⁵⁵³ *O'Connor* [1991] Crim LR 135

⁵⁵⁴ Reflecting the view of Lord Bingham in *Shaw v The Queen* [2001] UKPC 26 at §19

⁵⁵⁵ [1925] 18 Crim App R 160

⁵⁵⁶ See also *Georgiades* [1989] Cr App R 206 and *Salih* [2007] EWCA Crim 2750 on the issue of the possession of firearms with intent only to use them in self defence

15. Defence of property was considered recently by the Court of Appeal in *Faraj*⁵⁵⁷ where it was deployed as a defence to a charge of false imprisonment. The defendant householder believed that a man who entered his house saying he was representing a utility provider was in fact a burglar. He detained him at knife point intending to make enquiries about the man's identity, but then released him before the enquiries were made. Tuckey LJ⁵⁵⁸ said:

"So what about defence of property? We can see no reason why a house-holder should not be entitled to detain someone in his house whom he genuinely believes to be a burglar. He would be acting in defence of his property by doing so. Here full effect can be given to the defendant's belief however unreasonable it may be. But this defence, like self defence, has its limits. The householder must honestly believe that he needs to detain the suspect and must do so in a way which is reasonable. So if the appellant believed that Mr Haq was a burglar he would be entitled to be judged on this basis even if his belief was unreasonable. If all that he had done was to detain Mr Haq for the purposes of establishing his identity it is most unlikely that he would be found to have acted unreasonably. Whether his use of a knife to do so was reasonable is another matter which, like everything else, would be for the jury to decide."

16. It follows that in judging the defence the jury will be assessing whether the defendant did have or may have had an honest belief that the circumstances rendered it necessary for him to defend his property. Whether the defendant acted reasonably in defence of his property will be decided on principles similar to those which apply to self defence.⁵⁵⁹

Directions

The first question for the judge is whether there is evidence from which the jury could conclude that the defendant acted in self defence. That evidence need not arise in the defence case if it is a reasonable possibility revealed by the evidence for the prosecution. Directions to the jury should contain reference to the two-stage test:

- Did the defendant honestly believe or may he honestly have believed that he needed to defend himself because he was under attack or in imminent danger of attack? The issue is not whether the defendant was in fact under attack or in imminent danger of attack but whether he genuinely believed that he was. But, if the jury concludes that there was no such attack or danger of attack that is something they are entitled to consider when deciding whether the defendant has told the truth about his belief. If the jury is sure that the defendant held no such belief self defence does not arise.

Footnotes

⁵⁵⁷ [2007] EWCA Crim 1033

⁵⁵⁸ At §22

⁵⁵⁹ Following the decision of the Court of Appeal in *Martin* [2002] 2 WLR 1, [2001] EWCA Crim 2245 (in which the defendant discharged a shotgun at two men entering his property and unsuccessfully pleaded self defence) the Crown Prosecution and the Association of Chief Police Officers issued a joint statement 'Householders and the use of force against intruders'. Describing the law of self defence the statement said: "Anyone can use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime. You are not expected to make fine judgments over the level of force you use in the heat of the moment. So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in self-defence. This is still the case if you use something to hand as a weapon. As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence." (www.cps.gov.uk/publications/prosecution/householders.html)

- If the defendant did genuinely believe or may genuinely have believed that he needed to defend himself the jury must decide whether the force he used was reasonable. Reasonable force means force proportionate to the nature of the threat the defendant honestly believed was posed by his adversary. If the defendant went well beyond what was needed to defend himself from the force offered by his assailant, that is good evidence that the defendant acted unreasonably. But, in judging whether the defendant acted unreasonably, the jury should have regard to the fact that it is difficult for a person to measure precisely what is needed in response and, if the defendant did only what he honestly and instinctively thought was necessary, that is strong evidence that he responded reasonably.

Where the issue arises whether drink may have played a part in the defendant's comprehension of the circumstances the jury should be told:

- The evidence is that the defendant had voluntarily taken drink. If, when they are considering the circumstances in which the defendant used force, the jury is sure that the defendant held a belief about those circumstances which was mistaken *because* he was under the influence of drink, the defendant is not entitled to rely on that mistaken belief. If, therefore, they are sure that, had the defendant been sober, he would not have made the mistake he did, they must judge his actions as if he had been sober, both on the question whether he needed to defend himself and, if so, on the question whether he needed to use the force he did. If, however, the circumstances were in fact such that the defendant was entitled to defend himself as he did (i.e. he was under attack or in imminent danger of attack and his response was proportionate), his drunkenness will be immaterial.

When there is evidence of self defence for the jury to consider the jury must be told:

- There is no burden on the defendant to prove that he was acting in self defence. The prosecution must prove so that the jury is sure that defendant was not acting in lawful self defence.

In *Harvey*⁵⁶⁰ two women confronted one another in the street. A fight ensued. At some stage the defendant admittedly bit V's nose. Her appeal was dismissed. The issue for the jury was whether the defendant was acting in self defence. CCTV evidence did not depict the moment when the bite was delivered. Moses LJ observed that if the judge's legal direction had been framed within the context of the evidence in the case the jury would have received greater assistance. There was no room for misunderstanding. There could be no difference between the facts as the jury found them to be and the facts as the defendant believed them to be. Once the jury resolved the facts their task was clear: if the defendant bit V while she, the defendant, had gained the upper hand, self defence did not run; if, on the contrary, she bit V while V had the upper hand, the question was whether the force used was reasonable.

Footnotes

⁵⁶⁰ [2009] EWCA Crim 469

Illustration – self defence

As we have heard, the complainant Mr A and the defendant Mr B are neighbours. They share the common driveway between their houses. From time to time there have been disputes when one has accused the other of obstructing his side of the drive with a vehicle. This is what occurred on 12 June. The defendant came home to find that Mr A had parked his new camper van in the driveway. It obstructed his side and he could not park his car off the road. The prosecution case is that the defendant lost his temper, marched to Mr A's front door and continuously rang the bell until it was answered by Mr A. As Mr A opened the door, the defendant punched him to the face. The force was sufficient to knock him to the ground. The defendant followed up with two kicks to Mr A's head. As a result Mr A suffered a black eye, he thought from the punch, and bruising and swelling to the back of his head behind his left ear from the kicks, both of which you have seen in the photographs. The defendant is charged in count 1 with assault occasioning actual bodily harm and in count 2 with common assault by battery. You are not asked by the prosecution to return guilty verdicts on both counts. They are alternatives. They are there for a reason I will explain in a moment.

In order to prove that the defendant committed either of these offences the prosecution must prove that the defendant used unlawful force on Mr A. The defendant admits that he punched Mr A to the face, but he says that his punch was delivered lawfully in self defence. He says that although Mr A went to the ground he did not follow up with a kick or kicks and Mr A must have banged his head against the door frame as he went down.

The main issue for you to resolve is whether the prosecution has proved, so that you are sure, that the defendant was not acting in lawful self defence. Let me explain the questions you need to consider.

As I have said, it is for the prosecution to prove that the defendant was not acting in self defence; it is not for the defendant to prove that he was.

A person who honestly believes that it is necessary to use force to defend himself may use reasonable force to do so. You may think that in this respect the law follows good common sense.

So the first question you need to resolve is whether the defendant did or may have believed that he needed to use force to defend himself. The defendant denies that as soon as Mr A opened the door he punched him. The defendant told you that when he asked Mr A to move his camper van, Mr A started shouting and then raised his fist, so he punched him. When the defendant was asked why it was necessary to use force rather than leave, the defendant said he had no choice, it was so quick. So you must resolve this issue. Are you sure that Mr A told you the truth about this confrontation? If you are sure he did, there would appear to be no room for the defendant to think he was under threat, but that is for you to decide. If you are sure that the defendant had no honest belief that he needed to use force that is the end of self defence and your verdict will be guilty of count 1 and you need go no further. If on the other hand, you think the defendant did believe, or may have believed, that he needed to use force to defend himself you pass to the second question.

A person is entitled to use reasonable force to defend himself. Reasonable force means proportionate force. It means not going completely over the top in your response to the threat you honestly think you face. Here, you may conclude that if the defendant honestly believed he needed to use force at all, then a punch was a reasonable response to a threat of a punch. As a matter of law, and again I suggest of common sense, you do not have to wait to be hit before you defend yourself. However, there is at this stage a second and important issue of fact for you to resolve. Mr A said that when he

fell to the ground he was kicked. Mrs A, his wife, said that her attention was drawn to the constant ringing of the door bell. She was in the kitchen. She turned off the gas stove and made her way to the front door. When she got there the door was already wide open, her husband was curled up on the floor and the defendant kicked him to the head. You again have to decide who is telling the truth. If you are not sure that Mr A was kicked while he was on the ground, then you would find the defendant not guilty because a punch and no more was reasonable. If, however, you are sure he was kicked once or more than once, you will need to decide whether that was proportionate and therefore reasonable, or completely over the top. The law is that a person defending himself does not have to judge to a nicety the degree of force it is necessary to use and, if he only did what he honestly and instinctively thought was necessary, that is strong evidence that what he did was reasonable. However, when the defendant was asked about his state of mind in evidence, he agreed that when Mr A was on the ground he was no longer any threat and he knew he wasn't; he accepted that he had no need to kick Mr A; and agreed that if he had kicked Mr A that would have been out of order.

If follows from what I have said that if you think the defendant may honestly have believed that he needed to defend himself and did no more than punch Mr A, your verdict would be not guilty.

If, on the other hand, you are sure the defendant did not honestly believe he needed to defend himself your verdict would be guilty.

Finally, if you think the defendant may have punched Mr A in self-defence but you are sure he went on to kick him while he was on the ground, you must decide whether that was a reasonable response. If you conclude it was or may have been a reasonable response then your verdict would be not guilty. If you are sure it was not a reasonable response, then your verdict will depend upon whether you are sure a kick or kicks caused the bruising and swelling to the back of Mr A's head. If you are sure it did, your verdict would be guilty of count 1, assault occasioning actual bodily harm. If you were not sure that the kick or kicks caused any bodily injury to Mr A your verdict would be not guilty count 1, but guilty count 2, common assault.

I have prepared a written Route to Verdict which will help you to answer the questions in the right order. If you do that you will arrive at your verdict. Let us read it together.

Illustration – Route to Verdict

Please answer question 1 first and proceed as directed

Question 1

Did the defendant honestly believe that he needed to use force to defend himself?

If you are sure that the defendant did not honestly believe that he needed to defend himself, verdict guilty count 1 and go no further

If you think the defendant may honestly have believed that he needed to defend himself, go to question 2

Question 2

Did the defendant use reasonable force to defend himself? See Notes 1-4 below

If you are sure the force used was unreasonable, go to question 3

If you think the defendant may have used reasonable force, verdict not guilty count 1 and not guilty count 2

Question 3

Did a kick or kicks delivered by the defendant cause bruising and swelling to Mr A's head?

If you are sure that a kick or kicks caused bruising and swelling to Mr A's head, verdict guilty count 1 and go no further

If you are not sure that a kick or kicks caused bruising and swelling to Mr A's head, verdict not guilty count 1 but guilty count 2

Note:

1. Reasonable force is force which is proportionate to the threat the defendant honestly believed he faced.
2. The defendant did not have to be exact in measuring the degree of force needed to defend himself. If he did only what he honestly and instinctively thought was necessary, that is strong evidence that what he did was reasonable.
3. If you are sure the defendant went completely over the top in response to the threat he thought he faced, the force he used was not reasonable.
4. If all the defendant did was punch Mr A in self defence, that was reasonable force; if you are sure the defendant also kicked Mr A on the ground, ask whether that was reasonable in the circumstances as Mr A thought them to be.

Illustration – self defence - drink taken – claim of honest and instinctive reaction - offence requiring specific intent

The complainant, V, told you that he was standing at the bar, chatting to his friend A about football, when he was struck from the side with a beer glass. The glass fractured and caused several deep cuts to the right side of V's neck and face. It is accepted that the defendant wounded V. The defendant's evidence was that he thought V called him a 'wanker'. He asked V what he meant by it. He said V made a movement which caused him to think he was about to be punched. The defendant demonstrated what he meant. He demonstrated V lifting his right arm from below the bar with his fist clenched. The defendant immediately struck out, forgetting that he had the glass in his hand. V was asked about this in evidence. He said he was not even aware of the defendant in the bar. He did not call him any name. He was withdrawing his wallet from his back pocket to pay for drinks and that must have been obvious to the defendant if he was looking. A agreed that V had just ordered drinks. They were talking about Liverpool football club. V made no remark to the defendant that he heard and he said that he was unaware of any sudden movement by V. The shattering glass against V's face came, he said, out of the blue.

As I have told you the prosecution must prove its case. That includes proof that the defendant was acting unlawfully. The defendant's case is that he was acting in self defence. If he was, the defendant was acting lawfully. It is not for the defendant to prove that he acted lawfully in self defence, but for the prosecution to prove that he did not. If, therefore, you consider that the defendant was or may have been acting in reasonable self defence you must find him not guilty of both count 1 (wounding with intent) and count 2 (wounding).

A number of issues have been raised in the evidence. I will, when I have completed my directions, hand you a note which will guide you through the questions you need to resolve in order to arrive at a verdict. First, let me explain what the law means by self defence:

If you honestly believe that you are under attack or that you are in imminent danger of attack from another person, you are entitled to use reasonable force to defend yourself. This definition contains two main elements. The first stage of your deliberations will concern the defendant's belief and the second stage, if you reach it, the reasonableness of his actions.

Stage 1

The defendant says that he feared an immediate attack and this is what caused him to react as he did. He was asked in cross examination whether he supported a football team. He said he supported Manchester United. He agreed that V would not have known that. He could not recall, he said, whether he overheard V talking about Liverpool. The defendant denied the suggestion made by the prosecution that he lashed out because of his strong dislike of Liverpool supporters. If, having considered the evidence, you are sure that the defendant's blow was purely aggressive and had nothing to do with any movement by V, you would not be dealing with a case of self defence at all. If, however, you think the defendant did believe or may have believed, even if he was mistaken, that he was about to be attacked, he was entitled to use force to resist it.

Counsel for the prosecution asked the defendant whether he could have made a mistake about V's movement to retrieve his wallet from his back pocket. He conceded that it was possible, but he did not think he had. He was asked how much alcohol he had consumed that night. He said he had two cans before he left the house and 4 pints of Strongbow in the bar. Asked whether his judgement may have been affected by the amount of alcohol he had taken, he said, no, he knew what he was doing and was just merry.

In judging whether the defendant honestly believed or may have believed that he was about to be attacked you should consider whether he had any reasonable grounds for that belief. If you are sure there were no such grounds, that conclusion may affect your decision whether the defendant held the belief at all. That is a question of fact for you to resolve. If you conclude that the defendant may have held a genuine but mistaken belief that he was about to be attacked, you will need next to consider the effect of alcohol upon him. The law does not permit the defendant to rely on the effect of his own voluntary intoxication. If you conclude so that you are sure that if he had been sober the defendant would not have misunderstood the situation he faced, and would have realised that no force was necessary, then self defence is excluded.

Therefore, you pass to stage 2 only if:

1. you decide that the defendant may honestly (and rightly) have believed that he was about to be attacked; or
2. you decide that the defendant may honestly (but you are sure, mistakenly) have believed he was about to be attacked, and you conclude that he may have made the same mistake if he had been sober.

Stage 2

Force used in self defence is lawful only if it was reasonable. Reasonable force is force which is proportionate to the threat the defendant believed he faced. Was it proportionate to strike V with a glass if V did raise his arm intending to punch the defendant? The defendant said that when he swung out he did not appreciate that the glass was in his hand. You will have to judge whether he was telling the truth about that. If you conclude that he may have been telling the truth, it would be a significant finding. It would be significant because you must judge the reasonableness of the defendant's reaction according to his own understanding of the situation. If he reacted suddenly, honestly and instinctively, and without thought for the glass, that would be strong evidence that what he did was proportionate to the attack he feared and was, therefore, reasonable. If, however, you conclude, so that you are sure, that the defendant knew that he was swinging a glass towards V's head, it is the reasonableness of that action which you must judge. If you are sure it was unreasonable, self defence is again excluded.

Unless you can exclude self defence, so that you are sure, you must find the defendant not guilty of both count 1 and count 2.

If you do exclude self defence, you should turn next to the question of intention. You must judge the defendant's intention from the evidence of the surrounding circumstances including the nature of the defendant's actions and, of course, his own evidence. He said he had no intention of causing the serious wounds he admits resulted from his action. When you are judging the defendant's intent the amount of drink he consumed is still relevant but in a different way. Drink is not an excuse for unlawful violence. An intention formed in drink is just as much an intention as an intention formed when sober. Some people become docile in drink; others become aggressive. You need to consider how drink affected the defendant. Did it make him aggressive; did it cloud his judgment; did it cause him to act without thinking? If the defendant became aggressive in drink and, in the moment he swung the glass, he intended to cause really serious injury, he is guilty of count 1. If you are not sure he intended to cause really serious injury, he is not guilty of count 1, but he is guilty of count 2. The reason is that the defendant accepts that he knew the blow he aimed at V would cause some harm. The law is that that is sufficient to prove guilt of count 2.

Questions of fact are, as I have emphasised, for you to resolve, but you will see the sense of the direction I am about to give you. You could not convict the defendant of count 1, wounding with intent, unless you were sure the defendant intended to cause really serious injury with the glass.

I have prepared a written Route to Verdict which will help you to answer these questions in the right order. If you do that, you will arrive at your verdict. Let us read it together.

Illustration – Route to verdict

Please answer question 1 first and proceed strictly as directed

Question 1

Did the defendant deliberately aim a blow at V which in fact caused a wound?

Admitted. Proceed to question 2

[STAGE 1] Question 2

When he aimed the blow, did the defendant honestly believe that he needed to use force to defend himself from an imminent attack by V?

If you are sure the defendant did not honestly believe that he needed to defend himself, self defence is excluded and proceed to question 8

If you consider that the defendant may honestly have believed that he needed to use force to defend himself, proceed to question 3

Question 3

Was the defendant's belief mistaken?

If you are sure that the defendant's belief was mistaken, proceed to question 4

If you are not sure the defendant's belief was mistaken, proceed to question 5

Question 4

Would the defendant have made the same mistake if he had been sober?

If you are sure he would not have made the same mistake if he had been sober, self defence is excluded and proceed to question 8

If you conclude he would or may have made the same mistake if he had been sober, proceed to question 5

[STAGE 2] Question 5

When the defendant aimed the blow at V, was he aware of the glass in his hand?

If you are sure the defendant was aware of the glass in his hand, proceed to question 7

If you are not sure the defendant was aware of the glass in his hand, proceed to question 6

Question 6

Was the force the defendant thought he was using (i.e. without the glass) proportionate and, therefore, reasonable in the circumstances?

If you are sure the force the defendant thought he was using was unreasonable, self defence is excluded and proceed to question 8

If you are not sure the force the defendant thought he was using was unreasonable, the force used was lawful and verdict not guilty count 1 and count 2

Question 7

Was the force used by the defendant (aiming a blow with the glass in his hand, at V's head) proportionate and, therefore, reasonable in the circumstances?

If you are sure the force the defendant used was disproportionate and unreasonable, proceed to question 8

If you are not sure the force the defendant used was disproportionate and unreasonable, the force used was lawful and verdict not guilty count 1 and count 2

Question 8

When the defendant aimed the blow at V did he intend to cause V really serious injury?

If you are sure he did intend really serious injury, verdict guilty count 1 and proceed no further
See Note 1 below

If you are not sure he did intend really serious injury, verdict not guilty count 1 and guilty count 2

Note 1:

You would find the defendant guilty of count 1 only if you were sure the defendant was not acting in self defence and he intended to cause really serious injury with the glass.

You would find the defendant guilty of count 2 if you were sure the defendant was not acting in self defence, but you were not sure he had the intent to cause really serious injury with the glass.

If you have concluded that the defendant was unaware or may have been unaware of the glass in his hand (Question 5 above), you could not conclude that the defendant intended to cause really serious injury. Your verdict would be not guilty count 1.⁵⁶¹

Sources

Archbold: 19-39/47, 19-187, 17-16; Blackstone: A3.31/38

Footnotes

⁵⁶¹ Section 76(4) provides "If D claims to have held a particular belief as regards the existence of any circumstances" he is entitled to rely on that belief whether it was reasonable or not but, by section 76(5), if his belief was attributable to voluntary intoxication, he may not rely upon it.

The question arises whether the defendant's claim not to have been aware, when he aimed his blow, of the glass in his hand, constitutes a claim to hold a particular belief 'as regards the existence of any circumstances' within the meaning of section 76(4). If it does, he may not rely on the belief if it was attributable to the drink he had taken. Such a finding would have a significant effect on the judgement whether the force used was reasonable.

The Illustration is drafted on the footing that section 76(4) (honest but mistaken belief) does not apply to unawareness of the glass because unawareness is the absence of belief and the defendant is not claiming that he positively believed he had no glass in his hand.

There is another reason why, in the Illustration, the addition of a further step in consideration of the effect of alcohol is unnecessary and would be confusing to the jury. If the defendant would have been aware of the glass in his hand but for the alcohol he had consumed, the jury would be required to assume he knew the glass was in his hand when deciding whether he acted reasonably. If such an assumption was required it would effectively remove from them the decision whether (section 76(7)(b)) the defendant acted honestly and instinctively. It is suggested that it cannot have been the intention of the section 76(5) to deprive the defendant of the jury's uninhibited decision under section 76(7)(b).

(3) Duress

Introduction

A. Duress by Threats

If an offence is committed under 'duress' the defendant is excused from criminal liability.⁵⁶² Once the defendant raises a sufficient case of duress in the evidence, the burden of disproving duress to the criminal standard rests upon the prosecution. The defence is not available to those charged with murder (whether as principal or aider and abettor, counsellor or procurer)⁵⁶³ attempted murder⁵⁶⁴ and, possibly, certain offences of treason.

Requirements of the defence

The precise ambit and requirements of the defence have emerged piecemeal during the last 30 years or so. They were explained by Lord Bingham in *Hasan*⁵⁶⁵:

1. The threat relied upon was a threat of serious injury or death;⁵⁶⁶
2. The harm threatened was directed at the defendant, a member of his immediate family, someone close to the defendant, or someone for whose safety the defendant reasonably regarded himself as responsible;⁵⁶⁷
3. The defendant genuinely and reasonably believed that the threat, but for his compliance, would be carried out immediately or almost immediately;
4. The threat, or the defendant's reasonable belief in the threat, was the direct cause of the defendant's actions;
5. A reasonable person in the defendant's situation would have been driven to act as the defendant did. A reasonable person is to be treated as sober, of ordinary firmness, of the same age and gender as the defendant, and otherwise sharing the defendant's relevant characteristics;⁵⁶⁸
6. There was no action to evade the effects of the threat which the defendant could reasonably have taken in the circumstances; but
7. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any criminal act which he is thereafter compelled to commit by them. In *Ali*⁵⁶⁹ the Court of Appeal explained that while those who may subject a defendant to compulsion would usually be those engaged in criminal activity, it was not

Footnotes

⁵⁶² *DPP for Northern Ireland v. Lynch* [1975] AC 653 (HL) per Lord Wilberforce at pages 679-680

⁵⁶³ *Howe* [1987] AC 417 (HL) (overruling *Lynch* on the applicability of the defence of duress to secondary parties to murder)

⁵⁶⁴ *Gotts* [1992] 2 AC 412 (HL)

⁵⁶⁵ [2005] 2 AC 467, [2005] UKHL 22 at §21

⁵⁶⁶ Query whether the threat of imprisonment would suffice (*Steane* [1947] KB 997); threat of psychological harm will not (*Baker* [1997] Crim LR 497; *Quayle* [2005] 1 WLR 3642)

⁵⁶⁷ It is suggested this would include someone immediately affected by the threat (e.g. "hand over the money or I will shoot this customer")

⁵⁶⁸ See below

⁵⁶⁹ [2008] EWCA Crim 716

the nature of the activity which mattered but the presence of the risk of compulsion from those with whom he was associating.⁵⁷⁰

Relevant characteristics

In *Bowen*⁵⁷¹ the Court of Appeal examined the question what relevant characteristics might be attributed to the 'reasonable man' for the purpose of applying the objective tests (i) whether the defendant held a reasonable belief that a relevant threat was made and would be carried out and (ii) whether a reasonable person would have responded as the defendant did. Stuart-Smith LJ said⁵⁷²:

"What principles are to be derived from these authorities? We think they are as follows:

- (1) The mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test.
- (2) The defendant may be in a category of persons who the jury may think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many women would doubtless consider they had as much moral courage to resist pressure as men; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection; recognised mental illness or psychiatric condition, such as post traumatic stress disorder leading to learned helplessness.
- (3) Characteristics which may be relevant in considering provocation, because they relate to the nature of the provocation, itself will not necessarily be relevant in cases of duress. Thus homosexuality may be relevant to provocation if the provocative words or conduct are related to this characteristic; it cannot be relevant in duress, since there is no reason to think that homosexuals are less robust in resisting threats of the kind that are relevant in duress cases.
- (4) Characteristics due to self-induced abuse, such as alcohol, drugs or glue-sniffing, cannot be relevant.
- (5) Psychiatric evidence may be admissible to show that the accused is suffering from some mental illness, mental impairment or recognised psychiatric condition provided persons generally suffering from such condition may be more susceptible to pressure and threats and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the defendant did. It is not admissible simply to show that in the doctor's opinion an accused, who is not suffering from such illness or condition, is especially timid, suggestible or vulnerable to pressure and threats. Nor is medical opinion admissible to bolster or support the credibility of the accused.
- (6) Where counsel wishes to submit that the accused has some characteristic which falls within (2) above, this must be made plain to the judge. The question may arise in relation to the admissibility of medical evidence of the nature set out in (5). If so, the judge will have to rule at that stage.

Footnotes

⁵⁷⁰ The trial judge's direction "The defence of duress does not apply if the defendant chooses voluntarily to associate with others where he ought to foresee that he might be subjected to compulsion by threats of violence" was approved

⁵⁷¹ [1996] 2 Cr App R 157, [1997] 1 WLR 372

⁵⁷² At [1997] 1 WLR pages 379-380

There may, however, be no medical evidence, or, as in this case, medical evidence may have been introduced for some other purpose, e.g. to challenge the admissibility or weight of a confession. In such a case counsel must raise the question before speeches in the absence of the jury, so that the judge can rule whether the alleged characteristic is capable of being relevant. If he rules that it is, then he must leave it to the jury.

(7) In the absence of some direction from the judge as to what characteristics are capable of being regarded as relevant, we think that the direction approved in *Graham*⁵⁷³ without more will not be as helpful as it might be, since the jury may be tempted, especially if there is evidence, as there was in this case, relating to suggestibility and vulnerability, to think that these are relevant. In most cases it is probably only the age and sex of the accused that is capable of being relevant. If so, the judge should, as he did in this case, confine the characteristics in question to these.

How are these principles to be applied in this case? Miss Levitt accepts, rightly in our opinion, that the evidence that the appellant was abnormally suggestible and a vulnerable individual is irrelevant. But she submits that the fact that he had, or may have had, a low IQ of 68 is relevant since it might inhibit his ability to seek the protection of the police. We do not agree. We do not see how low IQ, short of mental impairment or mental defectiveness, can be said to be a characteristic that makes those who have it less courageous and less able to withstand threats and pressure...”

In *Antar*⁵⁷⁴ the Court applied Stuart-Smith LJ’s test for the admissibility of expert evidence going to the issue of “mental impairment or mental defectiveness”. The defendant had a full scale IQ score of 51 and was abnormally suggestible even among a peer group of learning disabled offenders. In those circumstances the evidence of a psychologist should have been admitted to assist the jury upon a relevant characteristic.

B. Duress of Circumstances

Duress of circumstances is, in common with duress by threats, a species of the defence of necessity.⁵⁷⁵ It is available for all offences save murder, attempted murder and some forms of treason. Although, as first identified, the defence applied to road traffic offences, there is no reason in principle why it should not apply to all other offences save those identified.⁵⁷⁶ The test, suitably adapted, is the same as for duress by threats. In *Martin*⁵⁷⁷ the defendant drove his car while disqualified. He did so, he said, under the duress of his wife’s suicidal condition. In a judgment of the court delivered by Simon Brown J it was said:

Footnotes

⁵⁷³ [1982] 1 WLR 294 At page 300 Lord Lane CJ expressed the appropriate direction in *Graham*’s case as follows: “The Crown having conceded that the issue of duress was open to the appellant and was raised on the evidence, the correct approach on the facts of this case would have been as follows. (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed King had said or done, he had good cause to fear that if he did not so act King would kill him or (if this is to be added) cause him serious physical injury? (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed King said or did by taking part in the killing? The fact that a defendant’s will to resist has been eroded by the voluntary consumption of drink or drugs or both is not relevant to this test.”

⁵⁷⁴ [2004] EWCA Crim 2708

⁵⁷⁵ *Conway* [1989] QB 290, 88 Cr App R 159

⁵⁷⁶ *Pommell* [1995] 2 Cr App R 607

⁵⁷⁷ [1989] 88 Cr App R 343 (CA)

"The principles may be summarised thus. First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances."

Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established."

There has been judicial debate whether the circumstances under which the defendant concluded he had to act were as he honestly, or as he honestly and *reasonably*, believed them to be.⁵⁷⁸ Having regard to the observations of Lord Bingham in *Hasan*⁵⁷⁹ it seems unlikely that the test for duress of circumstances will be construed more favourably to the accused than the test for duress by threats. In other words, the defendant's belief in the threat created by the circumstances must be genuine and reasonable. In *DPP v. Bell*⁵⁸⁰ the Divisional Court seemed to accept that the threatening circumstances had to be the direct cause of the accused's actions and the defence would not be available if the defendant would have acted as he did in any event. In *Pommell*⁵⁸¹ the Court of Appeal held that where the offence is a continuing one, as in possession of a firearm, the obligation of the defendant was to desist from committing the offence as soon as he reasonably could.

Illustration – duress by threats – expert psychologist's evidence of impaired mental functioning – opportunity to escape threats - whether threats "caused" the defendant's unlawful acts - associating with persons who may subject the defendant to compulsion

The defendant admits that he conveyed 5 kilos of crack cocaine to a drug dealer in Sheffield. His defence is that he was acting under duress. Let me first remind you of the evidence upon which the defendant relies. I shall then explain how should approach the issue of duress.

The defendant told you that he had been a crack addict for 18 months. His supplier was a man the defendant refused to name. I shall call him X. The defendant said that he had run up a debt with X of about £500 which he was unable to repay. About 12 months ago X told him that he could work off the debt by running errands for him. This meant delivering drugs and collecting money. He was not the only one. He knew others who were in a similar position. The defendant continued to receive

Footnotes

⁵⁷⁸ *DPP v. Rogers* [1998] Crim LR 3422; *Martin* (David Paul) [2000] 2 Cr App R 42; *Cairns* [1999] 2 Cr App R 137

⁵⁷⁹ *Supra*

⁵⁸⁰ [1992] RTR 335

⁵⁸¹ *Supra*

crack cocaine for his personal consumption and he never managed to repay his debt, which went up to £1,000. X told the defendant that he would have to take longer trips and carry greater quantities. After the first such trip the defendant decided that he could not risk any further errands for X and told him so. X threatened that if he refused he would have to repay the debt immediately or be killed. This was a threat which the defendant said he took seriously because he was aware that X and his associates were reputed to have killed by shooting at least one other person who had been unable to repay a large debt. Asked for how long he had known of X's reputation, the defendant said he knew of it after he started to purchase drugs from him but before he started working for him.

Burden and standard of proof

There are circumstances in which an accused person, although admitting that he intentionally committed a serious offence, can be excused by the law. It will not surprise you to learn that the test whether the defence of duress applies to the circumstances of the case is strict. Although duress has been raised in the evidence, it is not for the defendant to prove it. It is for the prosecution to exclude duress so that you are sure. You need to consider a series of questions. I shall hand you a written note containing those questions in a moment and we shall go through them together but, first, let me expand on the law.

Threats

The first question for you to consider is whether the defendant was threatened, as he says, with death if he refused to carry out the offence.⁵⁸² The only evidence of the threat is that of the defendant himself. He has been challenged about it by the prosecution during his evidence. It was suggested to him that this was a convenient way of avoiding a conviction for possession with intent to supply class A drugs and, if it was true, he would have given a much fuller account of it in his interview under caution. The defendant told you that he was frightened then and is still frightened of saying anything which might get back to his tormentors. This is why he has refused to name them. You must decide whether the defendant's life was threatened or not. If you are sure it was not, that is the end of duress and your verdict would be guilty. If, however, you accept the defendant's evidence that his life was threatened, or you conclude that he may have been threatened as he says, then you should proceed to the second question.

Genuine and reasonable belief

The second question is whether the defendant genuinely and reasonably believed that if he did not act as he was told the threat to kill him would be immediately or imminently carried out. The defendant has told you why he thought his life was in imminent danger if he refused to act as instructed. However, because he has refused to name either X, or anyone associated with him, or the victim who is reputed to have been killed on X's instructions, it has not been possible for any confirmatory enquiries to be made. As to whether the defendant personally and reasonably believed his life was in imminent danger, your decision must depend upon your view of the defendant's own

Footnotes

⁵⁸² Note that in this illustration the issue of a reasonable belief in the existence of the threat does not arise. Either the threat was made or it was not. In other cases it may be necessary to add the words "or reasonably believed that he was threatened with serious injury or death".

evidence. If you are sure that when he committed the offence the defendant did not believe that, unless he complied with the threat, he was in immediate or imminent danger of death, duress is again excluded. If, on the other hand, you conclude the defendant may have held that belief, you next have to judge whether it was a belief reasonably held in the circumstances.

If you conclude that the defendant may have held that belief for the reasons he has given, then you are likely also to find that it was a belief reasonably held.

Threat caused the defendant to act

The third question is whether it really was the threat which caused the defendant to act as he did. The defence of duress is available only when the direct cause of the defendant's unlawful act was the threat on which he relies. If he would have carried out the act with or without the threat, then duress does not apply. It is pointed out to you by the prosecution that the defendant admits making a previous delivery while under no threat from X. Counsel for the defendant has argued that you should accept the defendant's account. It is suggested that if you think it may be true that the defendant had resolved not to make further deliveries, there must have been a compelling reason why he went on to do so.

If you are sure that the defendant would have carried out the delivery whether or not he was threatened, for example because he wanted the payment in drugs or money, duress is excluded. If, on the contrary, you conclude that the threat was or may have been the real reason for the delivery, you should proceed to the fourth question.

Reasonable person driven to act as the defendant did

People in the defendant's position are expected to be ordinarily robust. The fourth question is, therefore, whether a reasonable person placed in the defendant's situation would have been driven by the threat to act as the defendant did. A reasonable person is, for this purpose, a sober person of ordinary firmness, of the same age and gender as the defendant, and with such other of the defendant's characteristics as are relevant to his ability to withstand or evade the threat and obey the law. The characteristics of the defendant which are relevant concern his particularly low level of intellectual ability.

Defendant's characteristics

You heard evidence from a clinical psychologist, Dr A, that she had interviewed the defendant on two occasions. On the second, she carried out a series of tests to ascertain how the defendant compared, in his intellectual functioning, with the population generally. In short, the defendant has an 'extremely low' IQ. His full scale IQ score was 55. His cognitive functioning is at a 'significantly impaired' level. Even among people with his own level of intelligence and functioning he is much more suggestible than most. This means that he is likely to alter his responses to questions if they are put in a leading form. He takes the line of least resistance. Also relevant is the defendant's own evidence. The defendant was asked about his achievements at school. He told you he had acquired a grade 'D' in GCSE English grammar, but he could not recall any others. He had held a job as a shelf filler and trolley collector at a supermarket. He held a driving licence and had been a delivery driver when he first became addicted to drugs. He agreed that when employed as a driver he had to speak to customers and obtain receipts for his deliveries which he had to produce when he returned to the depot.

The question you need to resolve is: Might a person of the defendant's age and gender, with his impaired level of intellectual ability and understanding, have been driven to do as the defendant did, or are you sure that a reasonable person with the defendant's level of intellectual ability and understanding would have found and taken advantage of an opportunity to escape the threat?

Opportunity to avoid threat

First, you need to consider the events of the previous day. The defendant agreed that he was not required there and then to take the holdall and deliver it. Having agreed to make the delivery he had twenty four hours within which to make himself scarce. Instead, he reported to X at 8 am on the following day. The defendant accepts that overnight he could have surrendered himself at a police station or otherwise avoided the people who were threatening him. The defendant said that he did think about it but decided to do as he was told because he was scared. This, suggests the prosecution, was the first opportunity available to the defendant to resist or to evade the threat made to him. It is not being suggested that the defendant did not understand that he had the chance to escape but that he was too frightened to do so. You will need to consider whether a person of reasonable firmness would have taken the opportunity which the defendant acknowledges he recognised.

Second, consider the journey to Sheffield. The defendant was unaccompanied in a car before he was stopped by the police. He was in possession of a mobile telephone. He had received one call during the course of the journey. That call was traced to a mobile phone registered to a woman who said the phone had been used by another person who she refused to name. Asked what the arrangement was, the defendant said in evidence that he had been told to report to the same number immediately he had made his delivery. That would have taken him another two hours or so. Asked why he did not telephone the police or stop at any of the many police stations between London and Sheffield, the defendant replied that it did not occur to him. He agreed that if it had occurred to him he could easily have made a call to the police or gone to a police station. When pressed, the defendant admitted that he must have thought about it but claimed that the police would not have been able to protect him anyway. X had ways and means of getting to him wherever he was. If this was the defendant's state of mind he, for the second time, does not seem to be claiming that he did not understand the opportunity available to him but that he was too frightened to take it. The question is whether you are sure a person of reasonable firmness would have taken it.

If you are sure that the reasonable person I have described would have evaded the threat, duress is disproved and you would find the defendant guilty. If, on the other hand, you conclude that such a reasonable man may not, through fear, have taken the opportunity to escape the threat, you should consider the last of the tests which apply to duress.

Awareness of risk of association

If a person voluntarily becomes or remains associated with others when he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any criminal act which, thereafter, they compel him to do.

On his own account, the defendant became involved in the unlawful trade in drugs when he first started working off his debt to X. He agreed that he knew of X's reputation before working for X. He agreed he knew that, if he got into debt, pressure would be put on him to repay his debt in one form or another. He told you that it was a shock when the threat was actually and explicitly made. That was something which he had not foreseen. He agreed that he had willingly made the first delivery. He decided he did not wish to make any more but felt trapped and unable to go to authority for help.

If you are sure that the defendant knew or, even with his intellectual disadvantages, ought to have known, when he started selling drugs for X, that he may be placed under compulsion to commit further criminal acts, the defence of duress is not available to him and your verdict would be guilty.

I have prepared a written Route to Verdict which will help you to answer these questions in the right order. If you do that, you will arrive at your verdict. Let us read it together.

Illustration – Route to verdict

Please answer question 1 and proceed as directed

Question 1

Was the defendant threatened by X with death if he did not make a delivery of crack cocaine to Sheffield?

If you are sure he was not, verdict guilty

If you conclude that he may have been, proceed to question 2

Question 2

Did the defendant honestly and reasonably believe that the threat would be carried out immediately or imminently if he did not comply?

If you are sure he did not, verdict guilty

If you conclude that he may have honestly and reasonably believed that the threat would be carried out immediately or imminently, proceed to question 3

Question 3

Was the threat the direct cause of the defendant's decision to deliver crack cocaine to Sheffield?

If you are sure that the defendant would have delivered the crack cocaine whether or not he was threatened, verdict guilty

If you conclude that the threat may have been the real cause of the defendant's decision, proceed to question 4

Question 4

*Would a reasonable person have been driven to act as the defendant did? See **Notes 1** and **2** below*

If you are sure the reasonable person would not have acted as the defendant did, verdict guilty

If you conclude that the reasonable person may have acted as the defendant did, proceed to question 5

Question 5

Did the defendant voluntarily join or continue to associate with X and his associates when he knew or ought to have known that he may be subjected by X to compulsion to act unlawfully?

If you are sure he did, verdict guilty

If you are not sure he did, verdict not guilty

Note 1:

The answer to this question depends upon your consideration of the opportunities, if any, presented to the defendant to escape from the threat made by X. Would the reasonable person have taken them or any of them?

Note 2:

The reasonable person is sober and of the same age and gender as the defendant. He is also a person with the defendant's learning and intellectual difficulties. But he is a person of ordinary firmness for a person of that age, gender and his level of intellectual functioning, and not unusually timid.

Sources

Archbold: 17-119/133; Blackstone: A3.20/30

Note: *Section 47 Criminal Justice Act 1925 provides that "on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband". See Shortland [1996] 1 Cr App R 116 and Cairns [2003] 1 WLR 796, [2003] 1 Cr App R 38, [2002] EWCA Crim 2838*

(4) Insane and Non-Insane Automatism

Introduction

Insanity

1. By section 2(1) of the Trial of Lunatics Act 1883 (as amended by section 1 of the Criminal Procedure (Insanity) Act 1964):

“Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity.”

2. Insanity is defined by the M’Naghten Rules the material part of which provides as follows⁵⁸³:

“the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act *the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, as not to know that what he was doing was wrong.*”⁵⁸⁴

3. Insanity must be proved by the defendant on a balance of probabilities.⁵⁸⁵

Automatism

4. Former JSB Specimen Direction 47 Automatism contains a helpful distillation of the principles as at April 2003 and is extracted at [Appendix 3](#).
5. Automatism is the performance of an involuntary act not caused by a disease of the mind within the meaning of the M’Naghten Rules. To be an involuntary act the loss of voluntary control must be complete.⁵⁸⁶ Deliberate and purposeful driving is inconsistent with involuntariness as is a mental condition which merely removes inhibition.⁵⁸⁷
6. The onus is on the defendant to raise in the evidence a sufficient case of automatism fit to leave the issue to the jury. Once the issue of automatism is left to the jury the burden is on the prosecution to disprove it to the criminal standard.⁵⁸⁸

Footnotes

⁵⁸³ 10 Cl. & Fin. 200

⁵⁸⁴ ‘Wrong’ means illegal or (probably) morally wrong by the standards of ordinary people— see for discussion Archbold 18-83b; Blackstone A3.19; Smith and Hogan 12th ed page 285

⁵⁸⁵ *Bratty v Attorney General for Northern Ireland* [1963] 1 AC 386, [1961] UKHL 3

⁵⁸⁶ *Attorney General’s Reference No 2 of 1992* [1994] QB 91

⁵⁸⁷ *Isitt* [1978] 67 Cr App R 44

⁵⁸⁸ *Hill v. Baxter* [1958] 1 QB 277

The trial judge's task

7. In most cases of alleged automatism it will be necessary for the trial judge to rule whether the condition on which the defendant relies is capable of amounting to non-insane automatism and, if not, whether the defence of insanity should be left to the jury. In *Burgess*⁵⁸⁹ Lord Lane CJ described the judge's task as follows:

"Where the defence of automatism is raised by a defendant, two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say, a case which falls within the M'Naghten Rules, or one of non-insane automatism."

8. In *Hennessy*⁵⁹⁰, Lord Lane adopted the analysis of Professor Sir John Smith QC in Smith and Hogan:

"If one wants any confirmation, it is to be found, if we may respectfully say so, in Smith and Hogan, Criminal Law (6th ed.) 1988, at page 186, where these matters are very helpfully and clearly set out. If we may just cite the passage from that page, it runs as follows:

"When a defendant puts his state of mind in issue, the question whether he has raised the defence of insanity is one of law for the judge. Whether D, or indeed his medical witnesses, would call the condition on which he relies 'insanity,' is immaterial. The expert witnesses may testify as to the factual nature of the condition but it is for the judge to say whether that is evidence of 'a defect of reason, from disease of the mind,' because, as will appear, these are legal, not medical, concepts."

Disease of the mind

9. The meaning of the expression 'disease of the mind' is not the same as the meaning of 'disease of the brain'. The Court in *Burgess* followed the opinion of Devlin J in *Kemp*⁵⁹¹:

"The law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding. If one read for 'disease of the mind' 'disease of the brain,' it would follow that in many cases pleas of insanity would not be established because it could not be proved that the brain had been affected in any way, either by degeneration of the cells or in any other way. In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent. There is no warranty for introducing those considerations into the definition in the M'Naghten Rules. Temporary insanity is sufficient to satisfy them. It does not matter whether it is incurable and permanent or not."

As the following notes demonstrate 'disease of the mind' encompasses any disease or malfunction of the body in consequence of which the defendant suffered the M'Naghten 'defect of reason'.

Footnotes

⁵⁸⁹ [1991] 2 QB 92 at page 4

⁵⁹⁰ [1989] 89 Cr App R 10 at page 14

⁵⁹¹ [1957] 1 Q.B. 399, 407, approved in *Sullivan* [1984] AC 156 (HL) at page 172

Origins of the disease – internal cause

10. In *Burgess* the defendant committed admitted acts of violence while sleepwalking. The medical evidence was that at the time the acts were committed the defendant's mind was functioning abnormally; it was a malfunction which came from within the defendant's own mind and there was no relevant external factor to account for it; the condition manifested itself in violence; there was a risk of recurrence (which the Court held was not essential to a finding of 'disease of the mind'). While suffering from this (transient) condition the defendant was suffering from a disease of the mind which, as the jury found, caused him to act without realising what he was doing. The judge's decision that there was no evidence to leave the issue of non-insane automatism to be considered by the jury was upheld.
11. Epilepsy⁵⁹², and naturally occurring hyperglycaemia arising from diabetes⁵⁹³, have also been held to be conditions amounting to a disease of the mind. The Court in *Burgess* noted⁵⁹⁴ the acceptance by the House of Lords⁵⁹⁵ that while major mental illness, such as schizophrenia, would constitute a disease of the mind, so might conditions having a physical origin, such as a brain tumour or arteriosclerosis.

External cause, medication and recklessness

12. The availability of the defence of automatism to a defendant suffering a hypoglycaemic or hyperglycaemic episode caused by a failure to stabilise his blood sugar by medication or food has been considered by the Court of Appeal in *Quick*⁵⁹⁶, *Bailey*⁵⁹⁷, and *Hennessy*⁵⁹⁸. In *Quick* the defendant's evidence was that he had taken his insulin, but had then consumed alcohol and no food. Lawton LJ explained the Court's decision that the issue of automatism should have been left to the jury as follows⁵⁹⁹:

"In our judgment the fundamental concept [*in the M'Naghten Rules*] is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. **A self-induced incapacity will not excuse (see *Reg. v. Lipman* [1970] 1 Q.B. 152), nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin.** From time to time difficult border line cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in *Reg. v. Cottle* [1958] N.Z.L.R. 999 , 1011 is likely to give the correct result, viz., can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?

Footnotes

⁵⁹² *Kemp (supra)*; *Sullivan (supra)*

⁵⁹³ *Hennessy* [1989] 1 WLR 287, [1989] 89 Cr App R 10

⁵⁹⁴ At page 99

⁵⁹⁵ In *Sullivan and Bratty*

⁵⁹⁶ [1973] QB 910

⁵⁹⁷ [1983] 1 WLR 760, [1983] 77 Cr App R 76

⁵⁹⁸ (*Supra*)

⁵⁹⁹ At pages 922-923

In this case Quick's alleged mental condition, if it ever existed, was not caused by his diabetes but by his use of the insulin prescribed by his doctor. Such malfunctioning of his mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind. It follows in our judgment that Quick was entitled to have his defence of automatism left to the jury and that Bridge J.'s ruling as to the effect of the medical evidence called by him was wrong. Had the defence of automatism been left to the jury, a number of questions of fact would have had to be answered. If he was in a confused mental condition, was it due to a hypoglycaemic episode or to too much alcohol? If the former, to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If yes, why did he not use the antidote of eating a lump of sugar as he had been advised to do? On the evidence which was before the jury Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his acts. We cannot say, however, with the requisite degree of confidence, that the jury would have convicted him. It follows that his conviction must be quashed on the ground that the verdict was unsatisfactory." [bracketed italics and bold emphasis added]

13. In *Bailey* the Court doubted the accuracy of the observation made *obiter* that the failure to take medication or food would not excuse the defendant if it was reasonably foreseeable that the failure would cause the 'involuntary' act. Griffiths LJ said⁶⁰⁰:

"It is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do dangerous or unpredictable things; they may be able to foresee the risks of causing harm to others, but nevertheless persist in their conduct. But the same cannot be said without more of a man who fails to take food after an insulin injection. If he does appreciate the risk that such a failure may lead to aggressive, unpredictable and uncontrollable conduct and he nevertheless deliberately runs the risk or otherwise disregards it, this will amount to recklessness. But we certainly do not think that it is common knowledge, even among diabetics, that such is a consequence of a failure to take food; and there is no evidence that it was known to this appellant. Doubtless he knew that if he failed to take his insulin or proper food after it, he might lose consciousness, but as such he would only be a danger to himself unless he put himself in charge of some machine such as a motor car, which required his continued conscious control.

In our judgment, self-induced automatism, other than that due to intoxication from alcohol or [proscribed] drugs, may provide a defence to crimes of basic intent. The question in each case will be whether the prosecution have proved the necessary element of recklessness.⁶⁰¹ In cases of assault, if the accused knows that his actions or inaction are likely to make him aggressive, unpredictable or uncontrolled with the result that he may cause some injury to others and he persists in the action or takes no remedial action when he knows it is required, it will be open to the jury to find that he was reckless." [bold emphasis added]

Footnotes

⁶⁰⁰ [1983] 77 Cr App R at page 80

⁶⁰¹ As in *Hardie* [1985] 1 WLR 64, [1985] 80 Cr App R 157 in which the CA held the trial judge should have left the issue whether it was reckless of the defendant to consume valium (whose effects were generally soporific and not, generally, to render the user aggressive, unpredictable or uncontrolled) when assessing whether he had the *mens rea* for arson being reckless as to whether life would thereby be endangered, contrary to section 1(2) and (3) Criminal Damage Act 1971.

14. Finally, in *Hennessy*, the defendant, charged with theft of a motor vehicle and dangerous driving, claimed to be suffering from a hyperglycaemic episode caused by his failure to take his prescribed insulin which, in turn, was due to his depressed and anxious state of mind. The judge found that the defendant's condition, if proved, arose from a disease of the mind caused by naturally occurring diabetes and not from any external factor such as that contemplated by Lawton LJ in *Quick*; accordingly, the verdicts available to the jury were guilty, or not guilty by reason of insanity. The defendant changed his pleas to guilty. It was argued on appeal that the defendant's failure to take insulin was due to an external factor (depression and anxiety caused by marital problems) which arguably caused non-insane automatism; thus, the defence should have been left to the jury. Lord Lane CJ, explaining the court's dismissal of the appeal, said⁶⁰²:

"In our judgment, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us, in themselves separately or together external factors of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in *R. v. Sullivan* (*supra*). It is contrary to the observations of Devlin J., to which we have just referred in the case of *Hill v. Baxter* (*supra*). It does not, in our judgment, come within the scope of the exception "some external physical factor such as a blow on the head or the administration of an anaesthetic."

The appellant was prepared to address arguments to the Court based upon *Bailey*. The Court held it was unnecessary to consider those arguments in view of its decision to uphold the reasoning of the trial judge,⁶⁰³ which can only mean that the Court considered it unnecessary to embark upon a judgment whether the judge should have left the issue of recklessness to the jury because the underlying cause of the defendant's failure to take insulin was incapable of amounting to an external factor in any event. It would seem to follow that the state of the law is that if Mr Hennessy had failed to take his insulin because he was angry and forgot, but did not appreciate the risk that he might act unconsciously, he would be entitled to a verdict of not guilty (unless anger⁶⁰⁴ and forgetfulness⁶⁰⁵ are themselves reckless), but if he failed to take his insulin because he was depressed, he would be not guilty by reason of insanity.

Summary

15. It is suggested that the effect of the current state of authority is as follows:
- A. If the defendant's unconscious act was caused by an internal factor then he cannot rely on automatism but may plead insanity;
 - B. If the defendant's complete loss of control over his acts, during which he committed the relevant unconscious act, was due to:
 - (i) consumption of medicine as prescribed, the defendant is not guilty of a crime of basic or specific intent, on the ground of automatism;
 - (ii) voluntary consumption of a drug or alcohol otherwise than as prescribed, the defendant may be guilty of a crime of basic intent on the ground that he was reckless as to the consequences of consuming the substance;

Footnotes

⁶⁰² [1989] 89 Cr App R at page 16

⁶⁰³ See [1989] 89 Cr App R at page 16

⁶⁰⁴ See e.g. *Parker* [1977] 1 WLR 600 per Lane LJ at page 604

⁶⁰⁵ Mere forgetfulness or a failure to concentrate are not the same thing as the unconsciousness giving rise to automatism or insanity: *Clarke* [1972] 56 Cr App R 225

(iii) voluntary consumption of a drug or alcohol otherwise than as prescribed, the defendant will be not guilty of a crime of specific intent;

(iv) failure to take palliative measures to correct the effect of a prescribed drug, the defendant may be guilty of a crime of basic intent on the ground that he was reckless as to the consequences of his failure.

Insanity and Automatism

16. It may happen that the trial judge is faced with medical evidence which requires him to leave the question of automatism to the jury but also to leave to the jury, in the event they reject automatism, the issue of insanity. In *Roach*⁶⁰⁶ the defendant stabbed V. There was psychiatric evidence that the defendant was suffering from an anti-social personality disorder. One of the defence psychiatrists expressed the opinion that the defendant was suffering from a state of automatism caused by the combined effect of fatigue, alcohol and prescribed medication upon a disordered personality. Although the psychiatrist called the condition 'insane automatism of the psychogenic type', the defence argued that it was the external factors which rendered the defendant a pure automaton; accordingly that the defence of automatism should be left to the jury. The judge declined, and directed the jury that they should consider the defence of insane automatism the burden of proof of which rested upon the defendant. The Court of Appeal, relying on *Quick*⁶⁰⁷, held that the judge should have left the issue of automatism to the jury. Potter LJ, explaining the decision, said:

"28. As already indicated, the prosecution urged upon the judge that what the doctors for the defendant placed before the jury amounted to 'Insane Automatism'; indeed it was so described by them in the phrase 'insane automatism of psychogenic type', the 'disease of the mind' which they identified being described as 'mixed personality disorder'. On the other hand, as the defence urged upon the judge, the opinion of the doctors plainly accorded a causative role to the contributory factors of alcohol and prescribed medication in combination with the personality disorder and fatigue. As counsel rightly submitted to the judge and, indeed, Mr Zeitlin for the Crown conceded before him, whatever the psychiatric definition adopted by the doctors in their reports and evidence and their reference to 'insane automatism', the legal definition of automatism allows for the fact that, if external factors are operative upon an underlying condition which would not otherwise produce a state of automatism, then a defence of (non-insane) automatism should be left to the jury.

29. Upon careful consideration, it seems to us that such was the position here...."⁶⁰⁸

The availability of the defence of non-insane automatism has, however, been severely curtailed by successive decisions of the Court of Appeal and House of Lords. It is likely to be limited to truly exceptional medical events and those unforeseeable occasions when the defendant is concussed by a blow or his conduct is an involuntary response to an emergency over which he has no control (e.g. a swarm of bees while driving a car).

Footnotes

⁶⁰⁶ [2001] EWCA Crim 2698

⁶⁰⁷ See the passage cited above

⁶⁰⁸ See the analysis and criticism of this reasoning in Smith & Hogan 12th ed. at page 313

Directions

Directions to the jury will inevitably follow discussion with the advocates. Their purpose will be to explain to the jury in the context of the facts of the case what findings are required, what verdicts follow those findings, and the burden and standard of proof.

Illustration – epilepsy – whether disease of the mind – expert evidence uncontested – jury’s approach

The defendant accepts that he attacked V. The evidence of V is not in dispute. The defence case is that at the time of the assault the defendant was labouring under the effects of an epileptic fit. He has called evidence from a medical expert, Dr A, which confirms that the defendant has suffered epilepsy since he was a child. It is largely controlled by medication but occasionally, despite medication, the defendant is liable to fit. Dr A explained that there are three stages. In the first stage he would be perceived as normal. In the second, when electrical discharges into the temporal lobes of the brain take place, he would be observed by others to be fitting. When he was in that state, it seems, V went to offer help. While in the third, post-ictal stage, the defendant’s mind was reacting to a perceived threat, but the defendant had no conscious awareness either of the reaction or of his movements.

When the prosecution opened the case you were informed that there was an issue whether the defendant was or was not labouring under the effects of a fit. Having considered the expert medical evidence the prosecution no longer takes issue with the defence. Let me explain the significance of this evidence.

It is a defence to a charge of assault that at the time of his acts the defendant, was suffering a defect of reason, from a disease of the mind, which caused him either not to know what he was doing or not to know that what he was doing was legally wrong. This is somewhat arcane language from the 19th century but in essence it is straightforward. There are two questions for you to consider:

1. Was the defendant suffering from a medical condition which at the time of the assault impaired the functioning of his mental faculties? For this purpose it does not matter whether the medical condition was a mental illness as you would ordinarily understand that term, or was a physical illness which had the effect of impairing the working of the mind; it can be either. Neither does it matter that the episode of malfunctioning was short-lived, provided it had the effect of impairing the defendant’s mental faculties, such as his ability to understand and control his actions.

2. If so, was the effect of the impairment so severe that it caused him during the critical moments not to know what he was doing or that what he was doing was legally wrong?

Let us consider each of these questions in turn.

Epilepsy is, as we have heard, a disorder of the central nervous system which can result in electrical disturbances in the brain. When they cause a fit the person's body appears to be and is convulsed. The patient is unable to resist the attack, is unconscious of his body's movements, and afterwards is often unaware that it occurred. Dr A, having listened to the evidence of V and the defendant, told you that while violence of this kind is an infrequent incidence of an epileptic fit, he has no doubt that the defendant was suffering the effects of such a fit when he lashed out at the unfortunate V. When he did so, he would have been unaware, as the defendant told you, of what he was doing.

A defendant is presumed to be responsible for his actions unless the contrary is proved. The burden is upon the defence to establish this defence. The standard to which it must be proved is the balance of probabilities. In other words, is it more likely than not that the defendant was suffering from impaired mental faculties of such a degree that he did not know what he was doing? The evidence would appear to be all one way. Dr A's evidence is unchallenged. The decision, however, is for you to make. If you accept this evidence, then the verdict you should return is 'not guilty by reason of insanity'. You may be surprised that a disorder of the central nervous system should be described as 'insanity'. However, insanity, as I have defined it for you, is a legal and not a medical term. It is simply a convenient word to describe the effect of the medical condition on the functioning of the mind. It has none of the connotations which you would associate with Dickensian England.

Illustration – charges of grievous bodily harm and grievous bodily harm with intent – defence of automatism arising from earlier blow to the head on sports field – whether complete loss of control – contested expert evidence - significance of alternative offences

The defendant is a rugby player. He was sent off by the referee, V, for stamping on the leg of an opponent at a ruck. The defendant accepts that he immediately reacted by punching V in the face. The result was a depressed fracture of V's cheekbone from which he has made a painful but full recovery. It is accepted by the defence that the injury inflicted constituted grievous bodily harm. The defendant is now charged with two offences in the alternative: count 1, causing grievous bodily harm with intent, and count 2, inflicting grievous bodily harm. There are two issues raised for your consideration. The first is whether the blow was inflicted unlawfully and the second, which arises only if you find the blow was unlawfully inflicted, is whether the defendant intended to cause really serious injury.

Let me explain how the question of unlawfulness arises. Ordinarily, a person is assumed to be in control of his own actions. So if a man punches another in anger his action is unlawful. Here, however, the defendant's case is that he has a lawful excuse for what he did. He says he had no conscious intention of punching the referee and his action in doing so was completely involuntary.

He says that earlier in game he and a member of the opposing team jumped for the ball at the same time at a kick-off. There was a collision of heads which caused him to be dazed. He lay still for a minute or so, and slowly came round. He played on for a further 20 minutes before he was sent off. The defendant's case is that he must have been in a state of concussion when he lashed out at the referee. That state of concussion deprived him of the conscious ability to control his actions. While he regrets what he did, his action was not, in these circumstances, unlawful.

The law is that if, when he threw the punch, the defendant was, because of some temporary condition of the mind, incapable of exercising control over his actions, so that his actions were involuntary, he is not

responsible for them and, for that reason, he did not act unlawfully. However, there is a difference between complete and partial loss of control. Only if the loss of voluntary control was complete is the defendant excused responsibility under the criminal law. Furthermore, a distinction needs to be made between loss of voluntary control and loss of inhibition. Inhibition is the quality of mind which prevents us from behaving badly. If you conclude that the defendant simply lost his temper that is not the same as loss of the ability to control his movements. The condition on which the defendant relies is called 'automatism', but that word is not used as a medical but as a legal term. It has the special meaning which I have just described. The defendant has raised the defence by giving evidence himself and by calling a medical expert on his behalf, Mr A, a consulting clinical psychologist. The burden of proving that the punch was thrown unlawfully is upon the prosecution. That means that the burden of proving, so that you are sure, that the defendant was not acting in a state of automatism rests on the prosecution.

Mr A gave evidence that concussion is a condition in which the brain is in a state of shock following a heavy blow to the head or whiplash of the neck which causes the brain to jar within the vault of the skull. Symptoms of concussion may include headache, dizziness, confusion, lack of feeling or emotion, anxiety, blurred vision, vomiting, and the inability to remember events prior to the injury. On the other hand, the body is not disabled. Concussion can vary in intensity. At its worst the patient is unconscious and unmoving. But, the patient may be able to continue running about, apparently taking part in a game of rugby, although performance is likely to be erratic and the player is likely to be spatially confused. The defendant's description of his state of mind is, in Mr A's opinion, consistent with the effects of concussion. Asked by counsel for the prosecution whether he was saying the defendant had completely lost control of his ability to control his actions, Mr A said it was unlikely but he could not exclude the possibility.

Dr B, a consultant neurologist specialising in brain injury, gave evidence on behalf of the prosecution after Mr A. He told you that in his opinion this was not a case of concussion at all or, if it was, it was an extremely mild version of it. Asked why that was so, he replied that the defendant had accepted a significant degree of recollection of events between his initial recovery from the clash of heads and the sending off. He recalls, for example, the scoring of a try by the opposition wing. He described making an attempt to tackle him before he went over the try line. He told you that he recalls being at the ruck and attempting to drive over the ball. He does not claim to have no recollection; he specifically denies that he was stamping on the legs of the opposition No. 8. He was rucking the ball. These are, Dr B told you, episodes of specific awareness which demonstrate the defendant's mind was functioning as it should. Following his sending off the police were called by the opposition linesman. By the time of their arrival half an hour later, the defendant had showered, dressed and left in his car. He drove home, 40 miles away without mishap, and received no medical advice before he was charged. Asked by counsel for the defendant whether he could exclude the possibility of concussion, Dr B said that nothing in medicine was certain, but in his opinion the defendant was dazed and probably suffered head ache and period of dizziness. He thought it highly unlikely that his capacity to exercise control over his movements was impaired, let alone completely removed. The very fact that he responded violently to his sending off suggests that his brain was making a normal response to a provocative stimulus.

The evidence of experts has been received to assist us to understand medical science which is not familiar to us. Neither Mr A, nor Dr B, examined the defendant at the time and they were being asked to express their medical opinion based upon the observations of others and the description of symptoms by the defendant himself. On the issue whether the defendant was suffering from concussion and, if so, what effect that may have had upon the functioning of his mind, their evidence is, you may think, of critical importance. It is not, however, the only evidence in the case. The judgement whether the defendant's ability to control his actions was completely removed is yours alone. You should judge the evidence of these expert witnesses as you would any other. You will need to consider their respective experience and expertise in the field of head injury and, perhaps most important, the quality of the analysis which leads them to express the opinions they did. It is for you to decide whether to accept an expert opinion or not.

If you conclude that when he punched V the defendant may have been concussed and, in consequence of his concussion, he may have completely lost his ability to control his actions, his actions would not have been unlawful and for that reason you must find the defendant not guilty of count 1 and count 2. If, however, you are sure, as the prosecution contends, that the defendant had not completely lost his ability to control his actions, the punch was delivered unlawfully and you would find the defendant guilty either of count 1 or of count 2.

Count 1 charges the defendant with causing grievous bodily harm with intent. Grievous bodily harm means really serious physical harm. You judge whether the defendant intended to cause really serious harm by considering all the surrounding circumstances, including the nature and force of the blow delivered, the immediate cause of the blow, its unexpectedness, and the exposed position of V as referee. However, the circumstances include the fact that the defendant had undoubtedly received a blow to the head shortly before. Such a blow was capable of affecting the defendant's ability to exercise sensible judgment even if it did not remove his capacity to control his physical movements. If you conclude that the defendant may have lashed out in an unthinking and instant reaction to his sending off you may conclude that the injury he caused was significantly greater than anything he intended. This is a judgement for you to make, but if you are not sure the defendant intended to cause really serious harm to V you would find him not guilty of count 1 but guilty of count 2.

I have prepared a written note which will guide you to an appropriate verdict depending upon your assessment of the evidence. Let us read through it together.

Illustration – Route to verdict

Please answer question 1 and proceed as directed

Question 1

Did the defendant punch V to the face causing him really serious physical harm?

Admitted, proceed to question 2

Question 2

When the defendant punched V, had he, by reason of concussion, completely lost his ability to control his actions? See note below

If you are sure the defendant had not completely lost his ability to control his actions, proceed to question 3

If you conclude the defendant may have completely lost his ability to control his actions, verdict not guilty count 1 and count 2

Question 3

Did the defendant, when he punched V, intend to cause V really serious physical harm?

If you are sure the defendant intended to cause V really serious physical harm, verdict guilty count 1 and proceed no further.

If you are not sure the defendant intended to cause V really serious physical harm, verdict not guilty count 1 but guilty count 2.

Note:

The loss of control required is a complete loss of the defendant's ability to control his actions, not, for example, an inability to restrain his temper.

Illustration – attack with a knife – alternative charges of wounding with intent and wounding – issue for the jury insane automatism or non-insane automatism

The defendant accepts that he attacked V with a knife. His defence is that his mind did not go with his act; that in the unusual circumstances here, his act was not unlawful, and he is entitled to be excused. That defence has raised two issues about which you have heard much in the evidence, automatism and insanity. As I told you at the time these may seem like rather forbidding words but you do not need to be concerned because they are used as legal rather than medical terms which I can explain to you.

Non-insane automatism

A person is generally taken to be responsible for his actions unless they are accidental. That is because a person is normally in control of his actions, in the sense that his mind exercises control over his physical movements. Rarely, however, it may be that a person has completely lost the ability to control his actions as a result of some medical or other event for which he is not responsible. In other words, he is acting as an automaton. Only if the loss of control is complete can the plea of automatism succeed. Now that the defendant has raised the issue in the evidence, you must consider it. The burden of proving that the defendant acted unlawfully rests on the prosecution. It is therefore the prosecution which must prove to you, so that you are sure, that the defendant had not completely lost his ability to control his actions; in other words, that the defendant was not, when he stabbed V, acting as an automaton.

Insane automatism

Let me turn for the moment to insanity. A person is assumed to be sane and therefore responsible for his actions unless the contrary is proved. But if a person acted while suffering a defect of reason, from a disease of the mind, which caused him either not to know what he was doing or not to know that what he was doing was legally wrong, there is a special verdict available of 'not guilty by reason of insanity'. These words 'defect of reason' and 'disease of the mind' were first used in the 19th century and may sound odd. They are in fact not complicated. There are two questions:

- 1. Was the defendant suffering from an impairment of his mental faculties caused by a medical condition?*
- 2. If so, was it so severe that he did not realise what he was doing or that what he was doing was wrong?*

The burden of establishing the defence of insanity rests on the defence. It means that before you could return the special verdict of not guilty by reason of insanity you would have to find that it was more likely than not the defendant's mental faculties were impaired in this way.

Defence expert evidence, personality disorder, alcohol, fatigue, prescribed drugs

How do these issues arise? You have heard evidence from psychiatric experts on both sides, for the defence and for the prosecution. They agree that the defendant suffers from an anti-social personality disorder. There is, however, disagreement between them as to whether this is a psychogenic disorder, that is to say a disorder originating in the mind, or merely a disordered aspect of the defendant's personality. All agree that the defendant's personality disorder could not alone cause the defendant to act as an automaton; nor is it a condition which can alone cause an impairment of the defendant's mental faculties in such a way as to remove his ability to realise what he was doing or knowing right from wrong. The defence expert witnesses told you it was their opinion that the defendant may have been suffering from automatism in consequence of the effect, unknown to the defendant, of alcohol, fatigue and prescribed drugs upon his personality disorder. Dr A told you that in his opinion it was the cocktail of alcohol and drugs which caused a state in which the defendant's mind was no longer in control of his physical actions. Dr B told you that he agreed with Dr A, save that in his opinion the underlying cause of the loss of control was the personality disorder which was, by reason of the effect upon it of alcohol and drugs, rendered a psychogenic disorder of the mind. The defendant was, in his view, suffering from a condition he called 'insane automatism'.

Prosecution expert evidence, neither automaton, nor insane

Dr C and Dr D gave evidence for the prosecution. They are agreed in their opinion that at no time was the defendant deprived of mental control of his physical movements, and at all times he knew what he was doing and was aware of the difference between right and wrong. Furthermore, they say that the defendant's personality disorder, with or without the drink and drugs consumed, could not constitute a disease of the mind or medical condition. It is merely a feature of the defendant's personality which makes him liable to act impulsively and without inhibition. The defendant was therefore not acting as an automaton and was not insane. He is responsible for his actions.

You will need to resolve these differences and your decision will determine whether your verdict is guilty, not guilty, or not guilty by reason of insanity. I will in a few minutes provide you with a note which explains how and in what order you should consider these issues so as to arrive at your verdict. You are not expected to remember what I am saying without a note to jog your memory.

Jury's approach to automatism

You should first consider the issue of automatism. Automatism does not apply if the defendant's condition arose from a disease of the mind, in other words a medical condition arising naturally from within. It only applies if you consider that the defendant lost or may completely have lost voluntary control of his actions because of the unknown effect upon him of prescribed drugs and alcohol. Only Dr A advances this opinion. You must decide whether you accept that his opinion is right or may be right. If his opinion may be right, your next decision is whether the effect of drugs and alcohol was such as completely to deprive the defendant of his ability to control his actions. Dr A and Dr B agree that the defendant was so deprived. Dr C and Dr D agree that he was not. If you conclude that the defendant's ability to control his actions may have been completely removed you should find the defendant not guilty of both count 1 and count 2.

If, however, you are sure either (1) that the cause of the defendant's loss of control was his personality disorder and not the alcohol and prescribed drugs, or (2) that he did not suffer a complete loss of control, you will have rejected the defence of automatism and you should turn next to the defence of insanity.

Jury's approach to insanity

First, you need to consider whether the defendant was suffering a disease of the mind, in other words an impairment of mental functioning caused by a medical condition. It was Dr B who expressed this opinion. Dr A, Dr C and Dr D all said that the personality disorder could not be regarded as a disease of the mind. If you consider that it is more likely than not that the defendant was suffering from a disease of the mind then you need to consider the second question which is whether the degree of impairment of the defendant's mental faculties was such that when he stabbed V he did not know what he was doing or did not know that it was legally wrong. If you conclude it is more likely than not that he did not know what he was doing or did not know it was legally wrong, your verdicts on both counts would be 'not guilty by reason of insanity'.

If, on the other hand, you decide that it is more likely than not either (1) that the defendant was not suffering a disease of the mind or (2) that he knew what he was doing and knew that it was legally wrong, then you will have rejected the defence of insanity.

Specific intent and the alternative

If you reject both automatism and insanity, that would leave the final question which is the intention with which the defendant stabbed V. If he intended to cause V really serious injury he is guilty of count 1. If you are not sure he had that intention your verdict on count 1 would be not guilty. To prove count 2 the prosecution must make you sure that the defendant deliberately stabbed V and that he must have realised there was a risk that V would be injured. If you are sure of that your verdict would be guilty of count 2. If you are not sure, it would be not guilty.

I have prepared a written Route to Verdict which will help you to answer these questions in the right order. If you do that, you will arrive at your verdict. Let us read it together. When we have done that I will remind you of the evidence relevant to each question.

Illustration – Route to verdict

Please consider question 1 and proceed as directed

Question 1

Did the defendant stab V with a knife causing a wound?

Admitted. Proceed to question 2

Automatism

Question 2

When the defendant stabbed V, was his mental ability to control his physical actions affected by alcohol and prescribed drugs consumed by him, or was the substantial cause of his actions his underlying personality disorder, or was his ability to control his physical acts unaffected by either?

If you are sure that the defendant's mental ability to control his physical actions was unaffected by his consumption of alcohol and drugs or you are sure that his mental ability to control his actions was removed by his personality disorder, proceed to question 4

If you conclude that the defendant's mental ability to control his actions was or may have been affected by the consumption of alcohol and prescribed drugs, proceed to question 3

Question 3

*When the defendant stabbed V, had his mental ability to control his physical actions been completely removed? See **Note 1** below*

If you conclude that the defendant's mental ability to control his physical actions had been completely removed, verdicts not guilty count 1 and count 2

If you are sure that the defendant's mental ability to control his physical actions had not been completely removed, proceed to question 4

Insanity

Question 4

*When the defendant stabbed V was he suffering from a disease of the mind, in other words a medical condition which impaired his mental functioning? See **Note 2** below*

If you consider that it is more likely than not that the defendant was suffering from a disease of the mind which impaired his mental functioning, proceed to question 5

If you consider that it is more likely than not that the defendant was not suffering from a disease of the mind which impaired his mental functioning, proceed to question 6

Question 5

Was the defendant's mental functioning so impaired that he did not know what he was doing or, if he did, he did not realise that what he was doing was legally wrong?

If you consider it is more likely than not that the defendant's mental functioning was impaired to this degree, verdicts counts 1 and 2, 'not guilty by reason of insanity'

If you consider it more likely than not that the defendant's mental functioning was not impaired to this degree, proceed to question 6

Note: if you reach question 6 you will have rejected both automatism and insanity

Intent**Question 6**

When the defendant stabbed V, did he intend to cause V really serious injury?

If you are sure he did, verdict guilty count 1 and proceed no further

If you are not sure he did, verdict not guilty count 1 and proceed to question 7

Deliberate or reckless act**Question 7**

When the defendant stabbed V did he do so deliberately?

If you are sure he did, verdict guilty count 2

If you are not sure he did, proceed to question 8

Question 8

When the defendant stabbed V did he do so recklessly, that is, realising that there was a risk of harm to V from the way he was using the knife, did the defendant nevertheless proceed to take that risk?

If you are sure he did, verdict guilty count 2

If you are not sure he did, verdict not guilty count 2

Note 1:

An inability to control emotions such as temper is not an inability to control physical actions

Note 2:

You need to resolve the issue whether the defendant's anti-social personality disorder is a disease of the mind arising from a medical condition or merely an extreme and abnormal form of personality trait capable of being exacerbated by alcohol and prescribed drugs

Sources

Archbold 17-78/101; Blackstone A1.6/7, A3.7, A3.13/19

(5) Provocation⁶⁰⁹

Introduction

1. Provocation is a partial defence to murder, but to no other offence, at common law. Unlike the defence of diminished responsibility, once there is evidence of provocation to be left to the jury, the burden is on the prosecution to disprove provocation to the criminal standard. If the elements of murder are proved and provocation is not disproved the defendant is entitled to a verdict of manslaughter.
2. Provocation was described by Devlin J in *Duffy*⁶¹⁰ as follows:

“Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.”

Provocation which actually causes in the accused a sudden and temporary loss of self control

3. While the trial judge should leave to the jury an alternative verdict available on the evidence, whatever stance was taken by the parties at trial⁶¹¹, there is no obligation to leave to the jury the defence of provocation where the evidence discloses no provocative words or conduct which could have caused the defendant to lose his self control, notwithstanding evidence that the defendant did in fact lose his self control.⁶¹² Where there is evidence of provocative words or conduct the trial judge should leave the defence to the jury, including the issue whether the defendant lost his self control.
4. Section 3 Homicide Act 1957 provides:

“Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”
5. The section is drawn in wider terms than the definition given by Devlin J in *Duffy*. Words alone or conduct alone or words in combination with conduct may constitute the provocation. There need be no quality of wrongfulness about the words or conduct if they do in fact cause a loss of self control.⁶¹³ The words or conduct may emanate from a third person, at least where they cannot sensibly be separated from the words or conduct of the victim.⁶¹⁴ The words or conduct may be aimed at a third person causing the defendant to lose his self control.⁶¹⁵

Footnotes

⁶⁰⁹ Note: Considerable changes to the partial defence of provocation will take place when a commencement date is set for Chapter 1, Part 2 Coroner's and Justice Act 2009

⁶¹⁰ [1949] 1 All ER 932n

⁶¹¹ *Coutts* [2005] 1 WLR 2154, [2007] 1 Cr App R 60, [2006] UKHL 39 (HL)

⁶¹² *Acott* [1997] 1 WLR 306, [1997] 2 Cr App R 94

⁶¹³ The persistent crying of a baby may be enough: *Doughty* [1986] 83 Cr App R 319

⁶¹⁴ *Davies* [1975] QB 691

⁶¹⁵ *Pearson* [1992] Crim LR 193

6. The loss of self control must be sudden and temporary but there may be some delay between the provocation and loss of control. Revenge after reflection is not, however, killing under provocation. On the other hand, where the provocative conduct took place over a prolonged period of time, the cumulative effect, culminating in a comparatively trivial act of provocation causing loss of self control, may be sufficient.⁶¹⁶

The effect upon a reasonable man

7. Section 3 provides that the judge must leave to the jury the question whether everything said or done was enough to make a reasonable man act as the defendant did.

8. In *Symmons*⁶¹⁷ Dyson LJ said:

“There is now no doubt as to the constituents of provocation. The defendant must have been provoked by things said or done or by both together to lose his self-control (limb 1). The jury must form a view as to the gravity of the provocation for the defendant in all the circumstances; and then (limb 2) decide whether, having regard to the actual provocation and their view as to its gravity, a person having the power of self-control to be expected of a person of the sex and age of the defendant would have done what the defendant did: see per Lord Hobhouse in *R v Smith (Morgan)* [2001] 1 Cr App R 31 at [224] and per Lord Nicholls in *AG for Jersey v Holley* [2005] 2 Cr App R 588 at [10] to [12].”

9. The Privy Council in *Attorney General for Jersey v. Holley*⁶¹⁸ considered the question whether the reasonable man test as explained in *DPP v. Camplin*⁶¹⁹ survived notwithstanding the decision of the majority of the House of Lords in *Smith (Morgan)*⁶²⁰. The test remains as in *Camplin*. Lord Nicholls, expressing the view of the majority in *Holley* said:

“10. Before 1957 loss of self-control had to be brought about by things done. Words would not suffice to constitute provocation. Section 3 extended the scope of the defence by providing that in future loss of self-control could be provoked either by things done or by things said or by both together. This extension had an effect on what evidence was relevant, and therefore admissible, on the issue of the gravity of the provocation, that is, the first element in the objective ingredient. As explained by Lord Diplock in *Camplin* [1978] AC 705, 717, when words alone could not amount to provocation the gravity of provocation depended primarily on degrees of violence. Once words could amount to provocation, the gravity of provocation could depend upon “the particular characteristics or circumstances of the person to whom a taunt or insult is addressed”. Lord Diplock expressed his view, at p 718, on what would be a proper direction to a jury on the question left to their determination by section 3:

“He should ... explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but *in other respects* sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.” (Emphasis added).

Footnotes

⁶¹⁶ *Ahluwalia* [1992] 4 All ER 889, [1993] 96 Cr App R 134

⁶¹⁷ [2009] EWCA Crim 654 at §50

⁶¹⁸ [2005] 2 AC 580, [2005] UKPC 23

⁶¹⁹ [1978] AC 705

⁶²⁰ [2001] 1 AC 146

11. Hence if a homosexual man is taunted for his homosexuality it is for the jury to consider whether a homosexual man having ordinary powers of self-control might, in comparable circumstances, be provoked to lose his self-control and react to the provocation as the defendant did. Authority for this proposition, if needed, is the “glue-sniffer” case of *R v Morhall* [1996] AC 90. There the deceased nagged the defendant about his addiction to glue-sniffing. The problem before the House of Lords was whether this addiction should have been taken into account at the defendant’s trial as affecting the gravity of the provocation: see p 97d. Lord Goff of Chieveley, with whose speech all members of the House agreed, said it should. The thrust of his reasoning was that, for this purpose, “the entire factual situation” was to be taken into account. This includes matters not falling strictly within the description “characteristics”. It also includes matters which are discreditable to the defendant. Lord Goff said, at p 99:

“suppose that a man who has been in prison for a sexual offence, for example rape, has after his release been taunted by another man with reference to that offence. It is difficult to see why, on ordinary principles, his characteristic or history as an offender of that kind should not be taken into account as going to the gravity of the provocation.” “

10. It was recognised that difficulties could arise where the defendant’s characteristics were capable of affecting not only the gravity of the provocation to him but also his capacity to exercise the self control of the reasonable man. Lord Nicholls said:

“17. Exceptional excitability or pugnacity is one thing. But what if the defendant is suffering from serious mental abnormality, as in the *Morgan Smith* case where the defendant suffered from severe clinical depression? Is he, for the purposes of the defence of provocation, to be judged by the standard of a person having ordinary powers of self-control?

18. The view of the minority in the case of *Morgan Smith* is that he is. The standard is a constant, objective standard in all cases. The jury should assess the gravity of the provocation to the defendant. In that respect, as when considering the subjective ingredient of provocation (did the defendant lose his self-control?), the jury must take the defendant as they find him, “warts and all”, as Lord Millett observed. **But having assessed the gravity of the provocation to the defendant, the standard of self-control by which his conduct is to be evaluated for the purpose of the defence of provocation is the external standard of a person having and exercising ordinary powers of self-control. That is the standard the jury should apply when considering whether or not the provocation should be regarded as sufficient to bring about the defendant’s response to it....**” [bold emphasis added]

11. Lord Nicholls considered the effect of this decision upon cases where the defendant was suffering ‘battered woman’ syndrome⁶²¹:

“...As explained above, the evidence of the woman’s condition may be relevant on two issues: whether she lost her self-control, and the gravity of the provocation for her. The jury will then decide whether in their opinion, having regard to the actual provocation and their view of its gravity for the defendant, a woman of her age having ordinary power of self-control might have done what the defendant did.”

Footnotes

⁶²¹ §25

12. Thus, while the battered woman syndrome suffered by the defendant may have the effect of reducing her capacity to maintain her self control, this feature of her disorder is not be attributed to the reasonable woman in her situation. However, the fact that the defendant was a long term victim of abuse, making each insult cumulatively worse and, thus, increasing the gravity of the provocation to her *would* be a feature properly to be attributed to the reasonable woman.
13. The words “enough to make a reasonable man do as he did” enable the jury to consider not just whether a reasonable person would have lost control but also whether the reasonable man, out of control, would have acted as the defendant did. In *Phillips v The Queen* Lord Diplock, delivering the opinion of the Privy Council, explained the jury’s task as follows⁶²²:

“In their Lordships’ view [the statute] in referring to the question to be left to be determined by the jury as being “whether the provocation was enough to make a reasonable man do as he [sc. the person charged] did” explicitly recognises that what the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did.

Before their Lordships, counsel for the appellant contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships’ view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon. It is not insignificant that the appellant himself described his own instantaneous reaction to the victim’s provocation in spitting on his mother as “I spin around quickly was to punch her with my hand.”

14. It is not, however, appropriate to speak in terms of proportionality of the response to the provocation offered, since to do so may give the impression that the defendant must exercise judgment which is a concept inconsistent with a loss of control.
15. For self-induced provocation see Archbold 19-62 and Blackstone B1.30

Footnotes

⁶²² [1969] 2 AC 130 at pages 137- 138

Directions

- Discussion with the advocates before speeches is required, particularly where the defence of provocation is put in the alternative or, despite some evidence of provocation, perhaps because it is inconsistent with the case being advanced, is not being put at all.
- The jury should be told that the burden of disproving provocation lies upon the prosecution to the criminal standard.
- The direction will require an explanation of the two-stage test using the words of the section but, essentially, placing it within the context of the evidence in the case.
- The provocative words or conduct should be identified, as should the development of cumulative or 'slow-burn' provocation.
- Any relevant characteristics of the defendant should be identified and their relevance to the stage 2 objective test explained

Verdict

Judges are not unanimous whether the jury, when asked to consider an alternative verdict of manslaughter on different grounds, should be asked, in the event they return such a verdict, on what basis they convicted. The matter is in the discretion of the trial judge. However, the Court of Appeal has warned of the dangers of asking the question in certain cases. Some jurors may have decided upon manslaughter on one basis while others preferred another. The jury may decline to reveal the basis of their decision.⁶²³ If the jury are told from the outset that if they convict of manslaughter they will be asked on which basis they convicted the danger should be avoided. If a written route to verdict is provided and the jury follows the progression of questions faithfully, the danger that they will not be unanimous as to the basis for a verdict of manslaughter will be minimal. If they are directed that there should be a unanimous answer to each question, the danger should be eliminated.

Illustration – killing by stabbing - provocation – anxiety disorder – whether sensitivity and touchiness an admissible characteristic - drink taken – diminished responsibility

If you are sure that the defendant by his deliberate act unlawfully killed V and that, at the time of his act of stabbing V, he intended to kill or to cause really serious injury, he is guilty of murder subject to the defence of provocation, or, in the alternative, diminished responsibility.

Provocation

Provocation is an issue raised in the evidence. It is not for the defendant to prove that he was provoked but for the prosecution to prove so that you are sure that provocation is excluded. For that reason it is desirable that you consider provocation first.

Footnotes

⁶²³ See *Cawthorne* [1996] 2 Cr App R (S) 445 (where the alternatives were lack of intent, provocation and gross negligence) for a useful analysis of the cases. See also Chapter 5(10) Agreement on the Factual Basis for the Verdict

The word 'provocation' in ordinary usage can mean any annoying remark or behaviour. But in the context of a trial for murder it has a specific legal meaning which I need to explain. Provocation is words spoken or acts done by V which would cause any reasonable person and actually caused the defendant suddenly and temporarily to lose his self control and kill. There is therefore a two-stage test to be applied.

Loss of control under provocation

The first stage is: Was the defendant, by words spoken or acts done by V, suddenly and temporarily caused to lose his self control? The defendant told you that locally he has a reputation for being homosexual. He says that in fact he is not. While the defendant was at the bar V, he said, called to him, "You're a 'Wus'." The defendant turned and asked V what he had said. V replied, "I called you a lady-man". The defendant went over to V and protested. V laughed at him. V placed a hand on each side of the defendant's face and kissed him on the lips. As V stood back, the defendant took a knife from his pocket and stabbed V once to the chest. V died before the ambulance arrived. No-one else recalls V using the words "Wus" or "lady-man", but several customers close by confirm that the defendant was protesting at something V had said and that V kissed the defendant on the lips.

The defendant ran out of the public house. An hour later he gave himself up to the police. When he was cautioned he immediately gave the account he has now given to you.

You may conclude that V undoubtedly did use provocative words and conduct towards the defendant. The defendant describes his reaction as, "I lost it". What is required is a sudden and temporary loss of self control. Mere anger, or a desire to teach V a lesson for the insult, is not enough. If you are sure that the defendant did not lose his self control; if, in other words, you are sure the defendant reacted with thought and deliberation: provocation does not apply and you would move on to consider diminished responsibility. If, however, you conclude that the defendant was or may have been provoked to lose his self control, you reach the second stage.

Reasonable man with the defendant's characteristics

The second stage is: would a reasonable person placed in the defendant's situation have reacted as the defendant did by stabbing V in the chest?

Who is the reasonable person for this purpose? He is a person of the same age and gender as the defendant. He is therefore a man of 23 years. He is a person having the powers of self control which you would expect of an ordinary, sober person. You have heard that the defendant had consumed 6 pints of cider. You must assume that the reasonable person would have been sober and not under the influence of alcohol. The reasonable person is someone with the defendant's characteristics. He is therefore a person who has been taunted about his sexuality on previous occasions. That may well affect the gravity of the provocation for this defendant and is something you need to consider when judging the response of a person with ordinary powers of self control. However, you have also heard that the defendant has been diagnosed as suffering an anxiety disorder, one feature of which may be to render the defendant more than usually sensitive and touchy. It is disputed by the prosecution that this was a symptom of the defendant's disorder. If you thought that a feature of the defendant's disorder was or may have been an unusual tendency towards sensitivity or touchiness it is a feature which, for present purposes, you must ignore. The reason is that the reasonable person must be presumed to have ordinary powers of self control and not to be unusually sensitive or touchy when subjected to taunting.

If you are sure the reasonable man I have described would not have reacted under provocation as the defendant did, provocation is excluded and you can proceed to consider diminished responsibility. If you conclude that the reasonable man may have reacted as the defendant did, your verdict should be not guilty of murder but guilty of manslaughter on the ground of provocation.

Diminished responsibility

You will need to consider diminished responsibility only if you are sure that the prosecution has proved the elements of murder and disproved provocation.

Diminished responsibility also has a particular legal meaning which I need to explain: If the defendant, when he attacked V, was suffering from an abnormality of mind, arising from inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for his act, then his responsibility is diminished and he should be found not guilty of murder and guilty of the lesser offence of manslaughter.

The burden is upon the defence to make good this defence on the balance of probabilities. In other words, before you found the defendant guilty of manslaughter on this ground you would need to conclude that it was more likely than not, on the evidence, that the defendant's responsibility was diminished.

Let us now consider each element of the defence.

Abnormality of mind

Abnormality of mind is not a medical term and it does not have to be a mental illness as you would usually understand it. It is a legal term and means a state of mind which is so different from that of ordinary people that you would recognise it as abnormal. The term abnormality of mind covers all its workings, such as the ability to form appropriately, and to exercise, perception, understanding, judgment and will.

The defence case is that the defendant was suffering from an anxiety disorder which is in fact a well recognised psychiatric condition arising from inherent causes. The defendant had visited a general practitioner on 4 occasions during the 2 year period before the killing complaining of symptoms such as headache, sweating, and palpitations. On one occasion he complained of the fact that he had been wrongly identified in his neighbourhood as homosexual and was being subjected to taunts. He was prescribed tranquillisers but was not referred for expert psychiatric opinion. Dr A and Dr B, on behalf of the defendant, and Dr C, on behalf of the prosecution, told you that in their opinion the defendant was suffering from the effects of an anxiety disorder. They differed only as to the severity of the symptoms.

Substantial impairment

The defendant's responsibility was only diminished, however, if you conclude, on balance, that as a result of the defendant's abnormality of mind, his mental responsibility for the killing was substantially impaired.

This requires you to consider to what extent the defendant's state of mind differed from that of the ordinary person. Was it so abnormal that the defendant's mental responsibility was substantially impaired? 'Substantially' is an ordinary English word to which you will bring your own experience. It means less than total and more than trivial. Where you draw the line is for your good judgment.

Dr A and Dr B expressed the opinion that the defendant's state of mind was very significantly different from normal. The probable reaction of a person suffering an anxiety disorder was to be extremely sensitive to criticism or teasing, but to withdraw from rather than to confront the source of his anxiety. Dr B called it 'internalising'. However, under the pressure of prolonged or extreme and direct insult the defendant was liable to respond with an explosion of frustration and anger. In their opinion, that is how the defendant reacted on this occasion. Accordingly, their view is that the defendant's mental responsibility was significantly impaired. They leave to you the question whether it was substantially impaired.

Dr C disagreed. He pointed out that on no previous occasion had the defendant given vent to his feelings in this way. He had not before complained of irritability or touchiness. While he accepted that the defendant suffered an anxiety disorder, he did not accept that it was of a severity which rendered his state of mind, in the context you are considering, radically different from normal. It would be a natural response to taunting about one's sexuality to become embittered and resentful. It was not, in his opinion, a response brought about by the defendant's abnormality of mind.

The defendant was cross examined about his possession of the knife. He said he had started to carry a knife about 6 months before the killing. He carried it for protection in case he was attacked. The defendant denied that he had armed himself so as to take retribution against anyone who taunted him. He was asked why then his response to V's words and actions was to thrust the knife into his chest. The defendant said he had had enough.

You must examine the evidence of the experts and reach your own judgement to what extent the defendant's mental responsibility was impaired by his abnormality of mind. You should, of course, when reaching that judgment take account of everything you have heard about the incident and the defendant, and not just confine yourselves to the opinions of the experts.

Alcohol

All the medical experts agreed that alcohol probably had a part to play in the defendant's behaviour. Alcohol can have a disinhibiting effect upon one's powers of self control. Some people get angry in drink; others become docile. To the extent that you consider the defendant's state of mind may have been affected by alcohol he had voluntarily consumed you should leave it out of account when judging the defendant's mental responsibility. The reason for this is that we are all in law responsible for the effects of alcohol which we choose to consume. The question you need to resolve is whether the defendant's mental responsibility for the killing is substantially impaired by the anxiety disorder from which he was suffering, quite apart from the effects of alcohol. If you conclude it is more likely than not that it was, your verdict will be not guilty of murder but guilty of manslaughter on the ground of diminished responsibility.

You may have a good deal of ground to cover. To assist you to address these questions in the correct order and to arrive at your verdict, I have prepared a written note. Let us read it together.

Illustration – Route to verdict

Please consider question 1 and proceed as directed

Question 1

Did the defendant, by his deliberate and unlawful act, kill V?

Admitted. Proceed to question 2

Intent

Question 2

Did the defendant, when he stabbed V, intend either to kill or to cause him really serious injury?

If you are sure the defendant intended to kill or to cause really serious injury, proceed to question 3

If you are not sure the defendant intended to kill or to cause really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent

Provocation

Question 3

When the defendant stabbed V had he, suddenly and temporarily, lost his self control as a result of words used by or the conduct of V?

If you are sure he had not, proceed to question 5

If you conclude that he may have done, proceed to question 4

Question 4

*Would a reasonable man placed in the defendant's situation have reacted to the provocation and killed as the defendant did? See **Note 1** below*

If you are sure he would not, proceed to question 5

If you conclude that he may have done, verdict not guilty of murder but guilty of manslaughter on the ground of provocation

Diminished responsibility

Question 5

Was the defendant, when he attacked V, suffering an abnormality of mind?

Agreed. Proceed to question 6

Question 6

Did the defendant's abnormality of mind substantially impair his mental responsibility for the killing? See Note 2 below

If you conclude that it is more likely than not that the defendant's mental responsibility was substantially impaired, verdict not guilty of murder but guilty of manslaughter on the ground of diminished responsibility

If you conclude that it is more likely than not that the defendant's mental responsibility was not substantially impaired, verdict guilty of murder

Note 1:

The reasonable man whose reaction you are considering would be of the same age and gender as the defendant. He would be a man who had been taunted before about his sexuality. He would be a man commonly treated as homosexual when he was not. He would be a sober man with ordinary powers of self control, not unusually aggressive and not unusually sensitive.

Note 2:

In deciding whether the defendant's mental responsibility was substantially impaired you should leave out of account the effect on his mind of alcohol voluntarily consumed.

Note 3:

If you find the defendant not guilty of murder but guilty of manslaughter you will be asked by the court clerk whether that is on the ground of lack of intent or provocation or diminished responsibility.⁶²⁴

Sources

Archbold: 19-50/65; Blackstone: B1.22/30

Footnotes

⁶²⁴ See 'Verdict' above

(6) Diminished Responsibility⁶²⁵

Introduction

Section 2 Homicide Act 1957

1. Diminished responsibility is a partial defence only to the offence of murder.⁶²⁶ It was provided by section 2 Homicide Act 1957 which reads:

“(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.”

2. The burden of establishing diminished responsibility lies on the defendant and the standard of proof is the balance of probabilities.

Evidence

3. Supporting medical evidence is required. Formerly, the rule was that the defendant’s descriptions of events and symptoms which formed the basis for the expert’s opinion were hearsay and required strict proof, although judges tended to allow some latitude to the defence when the defendant’s mental state made it undesirable that he should give evidence. Now, in an appropriate case, the defence may seek the admission of the hearsay in the interests of justice under section 114(1)(d) or by agreement under section 114(1)(c) Criminal Justice Act 2003. Nevertheless, where the underlying facts are in dispute the absence of admissible evidence to support the expert’s conclusion may be the legitimate subject of comment by the trial judge.⁶²⁷

Abnormality of Mind

4. The meaning of the term ‘abnormality of mind’, which is not a medical term, was considered by the Court of Criminal Appeal in *Byrne*⁶²⁸. Lord Parker CJ said:

Footnotes

⁶²⁵ Note: Considerable changes to the partial defence of diminished responsibility provocation will take place when a commencement date is set for Chapter 1, Part 2 the Coroner’s and Justice Act 2009

⁶²⁶ To be distinguished from M’Naghten insanity and not a defence to attempted murder (*Campbell* [1997] Crim LR 495), nor following a finding of unfitness to plead under section 4A(2) Criminal Procedure (Insanity) Act 1964 (*Antoine* [2001] 2 AC 340)

⁶²⁷ *Bradshaw* [1986] 82 Cr App R 79 (CA)

⁶²⁸ [1960] 2 QB 396

“‘Abnormality of mind,’ which has to be contrasted with the time-honoured expression in the M’Naughten Rules ‘defect of reason,’ means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.....

Whether the accused was at the time of the killing suffering from any “abnormality of mind” in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.

The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.”

Substantial Impairment

5. Lord Parker CJ continued:

“The expression “mental responsibility for his acts” points to a consideration of the extent to which the accused’s mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.....

Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from

“abnormality of mind” from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called “substantial,” a matter upon which juries may quite legitimately differ from doctors.”

6. In *Lloyd*⁶²⁹ the Court of Criminal Appeal approved the trial judge’s direction as to the meaning of the word ‘substantial’ in the context of impairment of mental responsibility:

“....your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say the mental responsibility need not be totally impaired, so to speak destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you....to say on the evidence: was the mental responsibility impaired and, if so, was it substantially impaired?”

Footnotes

⁶²⁹ [1967] 1 QB 175, 50 Cr App R 61

7. In *Khan*⁶³⁰ Aikens LJ explained that Lord Parker's formulation of the test of impairment was relevant to:

"First, the degree to which the defendant comprehended what physical acts he was doing, or what he was omitting to do in relation to the killing. Secondly, the degree to which the defendant had (at that time) any power to exercise control over his actions or omissions in doing or being a party to the killing."

He continued:

"Scientific understanding of how the mind works and the extent to which states of mind and physical responses to them have physical or chemical causes have undoubtedly advanced considerably since Lord Parker made those statements. But we venture to suggest that, even today, it is impossible to provide any accurate scientific measurement of the extent to which a particular person who is suffering from an *"abnormality of mind"* resulting from one of the causes set out in the parentheses in section 2(1) could understand or control his physical impulses on a particular occasion. In other words, there is no simple scientific test of whether a defendant's *"mental responsibility for his acts and omissions in doing or being a party to the killing"* is *"substantially impaired"*."

Consumption of Alcohol

8. Not infrequently the court is faced with a defendant said to be suffering from an abnormality of mind within the meaning of section 2 and from the effects of the consumption of alcohol. The alcohol may or may not, but usually will have, contributed to the abnormality of mind at the time of the killing. Until the decision of the House of Lords in *Dietschmann*⁶³¹ juries were directed that if the killing would not have occurred had the defendant been sober diminished responsibility was disproved. The House held that this was an error; the test was simply whether, ignoring the contribution of alcohol, the defendant's mental responsibility was substantially impaired. Lord Hutton explained his view, with which the House agreed, as follows:

"I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing. In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts."⁶³²

Alcohol dependency syndrome

10. For cases in which it is contended that the abnormality of mind was induced by alcohol dependency syndrome reference should be made to *Tandy*⁶³³, *Wood*⁶³⁴ and *Stewart*⁶³⁵. In *Wood*, the Court of Appeal re-visited the issue in the light of *Dietschmann*. The effect of *Wood* and *Stewart* is that voluntary

Footnotes

⁶³⁰ [2009] EWCA Crim 1569 at §18

⁶³¹ [2003] 1 AC 1209, [2003] UKHL 10

⁶³² §18

⁶³³ [1989] 1 WLR 350, 87 Cr App R 45

⁶³⁴ [2008] 3 All ER 898, [2008] EWCA Crim 1305

⁶³⁵ [2009] EWCA Crim 593

intoxication is not a bar to a plea of diminished responsibility where the jury accepts that the defendant was suffering from alcohol dependency syndrome. The jury is required to make a judgement whether the consumption was voluntary or was induced by the irresistible craving brought about by the alcoholic disease. In line with the decision in *Dietschmann* the Court held that to the extent the consumption was voluntary its effects should be put to one side and a judgement made whether the disease itself substantially reduced the defendant's mental responsibility. In *Wood*, the President, Judge LJ, explained the decision as follows ⁶³⁶:

"In our judgment *Dietschmann* requires a re-assessment of the way in which *Tandy* is applied in the context of alcohol dependency syndrome where observable brain damage has not occurred. The sharp effect of the distinction drawn in *Tandy* between cases where brain damage has occurred as a result of alcohol dependency syndrome and those where it has not, is no longer appropriate. Naturally, where brain damage has occurred the jury may be more likely to conclude that the defendant suffers from an abnormality of mind induced by disease or illness, but whether it has occurred or not, logically consistent with *Dietschmann*, the same question (i.e. whether it has been established that the defendant's syndrome is of such an extent and nature that it constitutes an abnormality of mind induced by disease or illness) arises for decision. That is for the jury. If the syndrome does not constitute such an abnormality of mind, diminished responsibility based on the consumption of alcohol will fail. If, on the other hand, it does, **the jury must then be directed to address the question whether the defendant's mental responsibility for his actions at the time of the killing was substantially impaired as a result of the syndrome. In deciding that question the jury should focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily.** Assuming that the jury has decided that the syndrome constitutes an abnormality of mind induced by disease or illness, its possible impact and significance in the individual case must be addressed. The resolution of this issue embraces questions such as whether the defendant's craving for alcohol was or was not irresistible, and whether his consumption of alcohol in the period leading up to the killing was voluntary (and if so, to what extent) or was not voluntary, and leads to the ultimate decision, which is whether the defendant's mental responsibility for his actions when killing the deceased was substantially impaired as a result of the alcohol consumed under the baneful influence of the syndrome." [Bold emphasis added]

11. In *Stewart* the Court of Appeal revisited the advice given in *Wood* (at paragraph 10 above). The judgment contains a helpful analysis of expert evidence given at Mr Stewart's trial and its impact upon the jury's task. As to the jury's assessment of the degree of impairment the court concluded that to invite the jury to attempt to separate out alcohol consumed voluntarily in order to ignore its contribution to the abnormality of mind was probably asking too much. Lord Judge CJ said:

"29. The effect of *Wood* was to align the principles which apply when the defendant's alcohol dependency syndrome has not (yet) caused discernible brain damage to those where it has. The consumption of vast amounts of alcohol may therefore reduce murder to manslaughter, first, when the effect of the intoxication is so extreme that the prosecution has failed to prove the necessary intent to kill or cause grievous bodily harm (*R v Sheehan and Moore*) and second, assuming that the necessary intent is proved notwithstanding the consumption of alcohol, on the basis of diminished responsibility, provided the defendant proves that he was suffering from such abnormality of mind induced by the disease or illness of alcohol dependency syndrome that his mental responsibility for his actions in doing the killing was substantially impaired.

Footnotes

⁶³⁶ §41

30. We offer these suggestions to trial judges structuring a summing up for the purposes of the defence of diminished responsibility based on alcohol dependency syndrome. At an early stage the judge may wish to reflect on the ordinary principles relating to voluntary intoxication. He should then outline the ingredients of the defence, effectively paraphrasing section 2 of the 1957 Act in the familiar way.

31. The jury should be directed to decide, *first*, whether the defendant was indeed suffering from an abnormality of mind at the time of the killing. For this purpose *R v Byrne* [1960] 2 QB 396 continues to be of assistance. The judge is likely to direct the jury that it does not necessarily follow from the fact that the defendant suffers from alcohol dependency syndrome that he has established the necessary abnormality of mind. This depends on the jury's findings about the nature and extent of the syndrome and whether, looking at the matter broadly, his consumption of alcohol before the killing is fairly to be regarded as the involuntary result of an irresistible craving for or compulsion to drink.

32. If the defendant proves the necessary abnormality of mind, the **second** question, is whether this was caused by disease or illness. In this class of case, the answer to this second question will normally follow from whatever answer is appropriate to the first question.

33. **Finally**, and assuming that the particular defendant's alcohol dependency syndrome did indeed constitute an abnormality of mind due to disease or illness, which was present at the time of the killing, directions about whether the defendant's mental responsibility for what he did was substantially impaired should be addressed in conventional terms. The jury should be assisted with the concept of substantial impairment, and may properly be invited to reflect on the difference between a failure by the defendant to resist his impulses to behave as he actually did, and an inability consequent on it to resist them.

34. **In answering their questions, the jury should be directed to consider all the evidence, including the opinions of the medical experts. The issues likely to arise in this kind of case and on which they should be invited to form their own judgment will include (a) the extent and seriousness of the defendant's dependency, if any, on alcohol (b) the extent to which his ability to control his drinking or to choose whether to drink or not, was reduced, (c) whether he was capable of abstinence from alcohol, and if so, (d) for how long, and (e) whether he was choosing for some particular reason, such as a birthday celebration, to decide to get drunk, or to drink even more than usual. Without seeking to be prescriptive about considerations relevant to an individual case, the defendant's pattern of drinking in the days leading to the day of the killing, and on the day of the killing itself, and notwithstanding his consumption of alcohol, his ability, if any, to make apparently sensible and rational decisions about ordinary day to day matters at the relevant time, may all bear on the jury's decision whether diminished responsibility is established in the context of this individual defendant's alcohol dependency syndrome.**

35. We acknowledge that this decision will rarely be easy. Indeed it is fair to say that diminished responsibility has always raised complex and difficult issues for the jury, not least because the defence usually involves conflicting medical evidence addressing legal, not medical concepts, for a jury of lay persons to decide. The jury is often called upon to confront problems relating to the operation of the mind with which they will be unfamiliar. Nevertheless the resolution of these problems continues to be the responsibility of the jury, and when addressing their responsibility they are inevitably required to make the necessary judgments not just on the basis of expert medical opinion but also by using their collective common sense and insight into the practical realities which underpin the individual case." [Bold emphasis added]

12. Lord Judge's advice at paragraph 34 of *Stewart* does not attempt to address the causative link, if any, between the alcohol dependence syndrome and the killing. The suggestion is offered that the jury first has to decide whether there is any causative link between the defendant's brain damage, or his (predominantly) involuntary excessive drinking, and the act which caused death. There usually is, if only in the disinhibition generated by excessive quantities of alcohol, which can result in an explosion of temper and uncontrolled violence. If, however, the defendant has exhibited no previous signs of violence while in a state of excessive drunkenness the jury may wish to consider the question of the relevance of the syndrome to the defendant's behaviour in the present occasion.

Directions⁶³⁷

Whether the defendant's mental responsibility was substantially impaired is a jury and not a medical question and save in the very exceptional case the defence of diminished responsibility should not be withdrawn from the jury.⁶³⁸

The jury should be told that they need to consider the defence of diminished responsibility only if the prosecution has established the elements of murder, that the burden of establishing diminished responsibility rests on the defence, and that the standard is the balance of probabilities. If the defendant also relies on lack of intent and provocation, they should be considered in that order, with diminished responsibility last.⁶³⁹

The evidence of the medical experts will need to be carefully analysed and explained.

The direction should include:

- What is meant by 'abnormality of mind'
- What abnormality of mind is relied upon
- The expert opinion of aetiology of the abnormality contended and the contribution made by the abnormality to the killing
- That the defence applies only when the defendant's mental responsibility was substantially impaired by the abnormality of mind
- An explanation of the word 'substantially'
- Where appropriate, that the effects of the voluntary consumption of drink or drugs should be ignored. The question for the jury is whether, quite apart from the contribution to the defendant's state of mind of drink or drugs voluntarily taken, the defendant's mental responsibility was substantially impaired by the abnormality contended
- Where the abnormality contended is alcohol dependency syndrome, see *Stewart* paragraph 11 above

Footnotes

⁶³⁷ For an Illustration of directions on Provocation and Diminished Responsibility see Chapter 16 (5) Provocation

⁶³⁸ *Khan* [2009] EWCA Crim 1569 at §42

⁶³⁹ The reason is that intent is an element of the offence of murder which the prosecution must prove, in provocation the prosecution bears the burden of proof, and in diminished responsibility the burden is on the defendant.

Verdict

Judges are not unanimous whether the jury, when asked to consider an alternative verdict of manslaughter on different grounds, should be asked, in the event they return such a verdict, on what basis they convicted. The matter is in the discretion of the trial judge. However, the Court of Appeal has warned of the dangers of asking the question in certain cases. Some jurors may have decided upon manslaughter on one basis while others preferred another. The jury may decline to reveal the basis of their decision.⁶⁴⁰ If the jury is told from the outset that if they convict of manslaughter they will be asked on which basis they convicted the danger should be avoided. If a written route to verdict is provided and the jury follows the progression of questions faithfully, the danger that they will not be unanimous as to the basis for a verdict of manslaughter will be minimal. If they are directed that there should be a unanimous answer to each question, the danger should be eliminated.

Illustration – abnormality of mind - reactive depression – alcohol voluntarily consumed

If the prosecution has proved so that you are sure that the defendant, by his deliberate, unlawful act, killed V intending to kill him or to do him really serious injury, then you will be sure of the elements of murder. You would, therefore, find the defendant guilty of murder unless you conclude that diminished responsibility applies in his case.

Diminished responsibility has a particular legal meaning which I need to explain: If the defendant, when he attacked V, was suffering from an abnormality of mind, arising from inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for his act, then his responsibility is diminished and he should be found not guilty of murder and guilty of the lesser offence of manslaughter.

The burden is upon the defence to make good this defence on the balance of probabilities. In other words, before you found the defendant guilty of manslaughter on this ground you would need to conclude that it was more likely than not, on the evidence, that the defendant's responsibility was diminished.

Let us now consider each element of the defence.

Abnormality of mind

Abnormality of mind is not a medical term and it does not have to be a mental illness as you would usually understand it. It is a legal term and means a state of mind which is so different from that of ordinary people that you would recognise it as abnormal. The term abnormality of mind covers all its workings, such as the ability to form appropriately, and to exercise, perception, understanding, judgment and will.

The defence case is that the defendant was suffering from reactive depression brought about by the prevailing circumstances of his life. It was explained by Dr A and Dr B, who gave evidence on behalf of the defendant, that by the word 'depression' they do not mean that the defendant just felt low or sad in mood, the sense in which you and I might say, "I'm depressed". They mean that the defendant was suffering from a clinical illness, diagnosed only after a detailed consideration of his symptoms.

It arose, they said, partly from injury caused by life's events and partly by the defendant's inherent susceptibility to depression.

Footnotes

⁶⁴⁰ See *Cawthorne* [1996] 2 Cr App R (S) 445 (where the alternatives were lack of intent, provocation and gross negligence) for a useful analysis of the cases. See also Chapter 5(10) Agreement on the Factual Basis for the Verdict

The prosecution case, which is founded upon the evidence of Dr B, is that although the defendant was suffering from clinical depression it was not severe.

In other words, there is no dispute between the experts that the defendant was suffering from an abnormality of mind when he killed V.

Substantial impairment

The defendant's responsibility was only diminished, however, if you conclude it is more likely than not that, as a result of the defendant's depression, his mental responsibility for the killing was substantially impaired.

This requires you to consider to what extent the defendant's state of mind differed from that of the ordinary person. Was it so abnormal that the defendant's mental responsibility was substantially reduced? 'Substantially' is an ordinary English word to which you will bring your own experience. It means less than total and more than trivial. Where you draw the line is for your good judgment.

It is here that the prosecution has taken issue with the defence. I shall remind you of the evidence in a few minutes. In short, Dr C acknowledged that the defendant had, in the 18 months leading to this killing, suffered some significant losses. First, his father died. The defendant became withdrawn, anxious and tetchy. In time, this led to arguments with his wife who, secondly, left the defendant, taking with her their 2 children. Thirdly, the defendant's wife met another man, the deceased, V. Fourthly, there were difficulties with access to the children. On the night of the killing, the defendant, by chance, came upon V in the same public house. They went outside to discuss their differences over child care. An argument developed and the defendant, to use his words, completely lost it. Dr A and Dr B concluded that the defendant's depression was, at that time, moderate to severe. They point to his sleeplessness, his weight loss, his lethargy, and his prolonged period of low mood with suicidal thoughts. In their view, the unfortunate consequence of the unexpected confrontation was an explosion of emotional anger in the defendant which was a direct cause of the violence which he used. They conclude that it was the ability of the defendant's mind to exercise the willpower to control his physical anger which had been substantially impaired.

Dr C did not agree. In his opinion the defendant's depression was, by the time of the killing, mild. The defendant's state of mind was in most respects not much different from the reaction of any ordinary man in his situation. Dr C agreed that during the period after the defendant's wife left, the defendant suffered his deepest and most prolonged period of depression. On the other hand, he was off work for only two weeks. He held down a responsible job and he worked his shifts on time. This is inconsistent with the picture of a man who was significantly disabled by his depression. Furthermore, the defendant told him that that he had met another woman about a month before the killing and that they were discussing a future together. This is a sign that the defendant's mood was lifting with optimism for a new life. In Dr C's view the defendant was almost fully recovered from his depression before the killing took place. He explained the defendant's explosion of anger as the reaction of a jealous man who was embittered by the experience of the loss of his family.

The effect of alcohol

The defendant said that he had consumed about 6 pints of lager before he came upon the deceased. That was rather more than he was used to and he accepted that he was tipsy. He acknowledged that alcohol may have had something to do with his outburst. All three medical experts agree that alcohol has a disinhibiting effect. It may well be that if the defendant had not taken alcohol he would have controlled the impulse towards violence.

Dr A told you that, notwithstanding the consumption of alcohol, it was his view that the defendant's mental responsibility was substantially impaired by the abnormality of mind caused by depression. Dr B told you that he could not hazard an opinion what contribution was made by alcohol and what by the abnormality of mind. He preferred to leave the question to you, the jury. Dr C's evidence was that the occasion for the defendant's violence was the explosion of anger caused by bitterness and jealousy, fuelled and disinhibited by alcohol.

The ultimate question

In putting forward a defence of diminished responsibility the defendant is not entitled to rely on the effects of his voluntary consumption of alcohol. That is something for which the law requires him to bear full responsibility. You may conclude that alcohol must have had at least some disinhibiting effect on the defendant. That does not, however, disqualify the defendant from relying on the defence. The question you need to resolve is whether, putting on one side the effect on his mind of drink, the defendant's mental responsibility for his actions was substantially impaired by an abnormality of mind caused by depression. If you conclude it is more likely than not that his mental responsibility was substantially impaired your verdict would be guilty of manslaughter. If on balance you conclude that it was not, your verdict would be guilty of murder.

I have prepared a written note which will assist you consider each of these questions in their proper sequence. Let us read it together.

Illustration – Route to verdict

Please consider question 1 and proceed as directed

Question 1

Did the defendant, by his deliberate and unlawful act, kill V?

Admitted. Proceed to question 2

Question 2

Did the defendant, when he attacked V, intend either to kill or to cause him really serious injury?

If you are sure the defendant intended to kill or to cause really serious injury, proceed to question 3

If you are not sure the defendant intended to kill or to cause really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent

Question 3

Was the defendant, when he attacked V, suffering an abnormality of mind?

Admitted. Proceed to question 4

Question 4

Did the defendant's abnormality of mind substantially impair his mental responsibility for the killing? See Note 1 below

If you conclude that it is more likely than not that the defendant's mental responsibility was substantially impaired, verdict not guilty of murder but guilty of manslaughter on the ground of diminished responsibility

If you conclude the defendant to show that it is more likely than not that the defendant's mental responsibility was substantially impaired, verdict guilty of murder

Note 1:

In deciding whether the defendant's mental responsibility was substantially impaired you should leave out of account the effect on his mind of alcohol voluntarily consumed

Note 2:

If you find the defendant not guilty of murder but guilty of manslaughter you will be asked by the court clerk whether that is on the ground of lack of intent or diminished responsibility ⁶⁴¹

Illustration – alcohol dependency syndrome – abnormality of mind - whether alcohol voluntarily consumed

If the prosecution has proved so that you are sure that the defendant, by his deliberate, unlawful act, killed V intending to kill him or to do him really serious injury, then you will be sure of the elements of murder. You would, therefore, find the defendant guilty of murder unless you conclude that diminished responsibility applies in his case.

Diminished responsibility has a particular legal meaning which I need to explain: If the defendant, when he attacked V, was suffering from an abnormality of mind, arising from inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for his act, then his responsibility is diminished and he should be found not guilty of murder and guilty of the lesser offence of manslaughter.

The burden is upon the defence to make good this defence on the balance of probabilities. In other words, before you found the defendant guilty of manslaughter you would need to conclude that it was more likely than not, on the evidence, that the defendant's responsibility was diminished.

Let us now consider each element of the defence.

Footnotes

⁶⁴¹ See 'Verdict' above

Abnormality of mind

Abnormality of mind is not a medical term and it does not have to be a mental illness as you would usually understand it. It is a legal term and means a state of mind which is so different from that of ordinary people that you would recognise it as abnormal. The term abnormality of mind covers all its workings, such as the ability to form appropriately, and to exercise, perception, understanding, judgment and will.

The abnormality relied upon by the defendant is the effect of his chronic alcoholism. Alcohol dependency syndrome is a recognised psychiatric condition. Here, it is not suggested that the defendant had suffered brain damage of such a degree that would itself constitute an abnormality of mind. Its main effect upon the mind is to damage or destroy the individual's choice whether to drink or not. The consultant psychiatrists who gave evidence for both sides all agree that the defendant's condition causes in him an involuntary and irresistible craving for alcohol until the point is reached at which the craving ceases. Beyond that point the defendant no longer craves alcohol until his blood/alcohol drops significantly and, if he continues to drink, he does so because he chooses.

The defendant described how he woke up after two hours of sleep to find V drinking without him. The defendant accepts that he must have exploded with rage and attacked V causing his death. The effect of the alcohol taken by the defendant during the previous day was, according to all the medical experts, to remove the defendant's capacity for rational judgment and self control. A blood sample was taken from the defendant at about 8 am. It is agreed that by counting back the amount of alcohol in the blood at the time of the killing could be calculated at 350 mgs alcohol per 100 mls of blood.

To the extent that those effects, loss of judgment and ability to exercise self control, were caused by alcohol consumed as a consequence of his alcoholic dependency syndrome, that is, alcohol consumed because he had no power to resist it, the defendant may argue that they arose from an abnormality of mind caused by disease. However, the defendant cannot rely upon those effects on his mind which resulted from his voluntary consumption of alcohol. The reason is that the law holds all of us responsible for the effect upon us of alcohol we choose to drink.

It is therefore important to consider with some care the evidence as to the defendant's consumption of alcohol during the 6 hour period before he went to sleep at midnight. Dr A and Dr B told you that in their opinion the defendant was throughout satisfying the craving the defendant's syndrome caused. Dr C, on behalf of the prosecution, disagreed. In interview with Dr C the defendant described his normal day's consumption. He would drink steadily during the day. In the evening he would either continue at a similar rate until he went to bed or he might binge-drink, depending upon how he felt. On the night before the killing, both the defendant and V attended a house party at which vast quantities of alcohol were consumed. The defendant said he had several cans of strong lager and a bottle and a half of vodka which exceeded his usual consumption by a considerable measure. In Dr C's opinion, the alcohol consumed by the defendant that night was, for the most part, consumed by choice and not compelled by his syndrome.

Taking a broad, common sense view, you need to consider how much of the defendant's consumption that night he could not resist and how much he consumed because he was partying and wanted to. You are not expected to bring mathematical precision to the evidence but to reach a sensible conclusion on a balance of probability. If you accept the evidence of Dr A and Dr B then all of it was involuntary; if, on the other hand, you accept the evidence of Dr C it was not very much. In reaching a conclusion you should, of course, take account of the defendant's description of his condition to the doctors and to you when he gave evidence.

You should then consider the following question: To what extent was the abnormality of mind suffered by the defendant (that is, the loss of judgment and the ability to exercise self control) occasioned by the syndrome rather than the voluntary consumption of alcohol?

Substantial impairment

The reason you need to consider this question is that diminished responsibility only applies if the abnormality of mind substantially impaired the defendant's mental responsibility for his acts. In judging that question it is the effect of the alcohol dependency syndrome caused by disease which you are considering rather than the effect, if any, of alcohol voluntarily consumed.

To what extent did the defendant's abnormality of mind caused by alcohol dependency syndrome make his state of mind to differ from that of the ordinary person? Was his state of mind so abnormal that the defendant's mental responsibility was substantially reduced? 'Substantially' is an ordinary English word to which you will bring your own experience. It means less than total and more than trivial. Where you draw the line is for your good judgment.

If you conclude that the defendant's alcohol dependency syndrome and its effects probably did substantially impair his mental responsibility, then your verdict would be not guilty of murder and guilty of the lesser offence of manslaughter. If, on the other hand, you conclude that the alcohol dependency syndrome and its effects probably did not substantially impair his mental responsibility, your verdict would be guilty of murder.

I have prepared a written note which will assist you consider each of these questions in their proper sequence. Let us read it together.

Illustration – Route to verdict

Please consider question 1 and proceed as directed

Question 1

Did the defendant, by his deliberate and unlawful act, kill V?

Admitted. Proceed to question 2

Question 2

Did the defendant, when he attacked V, intend either to kill or to cause him really serious injury?

If you are sure the defendant intended to kill or to cause really serious injury, proceed to question 3

If you are not sure the defendant intended to kill or to cause really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent

Question 3

Was the defendant, when he attacked V, suffering an abnormality of mind?

Admitted. Proceed to question 4

Question 4

Did the defendant's abnormality of mind substantially impair his mental responsibility for the killing? See Note 1 below

If you conclude that it is more likely than not that the defendant's mental responsibility was substantially impaired, verdict not guilty of murder but guilty of manslaughter on the ground of diminished responsibility

If you conclude the defendant has failed to show that it is more likely than not that the defendant's mental responsibility was substantially impaired, verdict guilty of murder

Note 1:

The substantial impairment must arise from the abnormality relied upon by the defendant which is alcohol dependency syndrome causing involuntary consumption of alcohol and, consequently, the loss of rational judgment and the ability to exercise normal self control. To the extent, if any, that loss of rational judgment and/or the ability to exercise normal self control were caused by alcohol voluntarily consumed (because the defendant was partying and wanted to) it does not arise from the alcohol dependency syndrome.

Note 2:

If you find the defendant not guilty of murder but guilty of manslaughter you will be asked by the court clerk whether that is on the ground of lack of intent or diminished responsibility.⁶⁴²

Sources

Archbold: 19.66/80; Blackstone B1.15/21

Footnotes

⁶⁴² Judges are not unanimous on the question whether it is appropriate to seek an explanation of the ground for the conviction of manslaughter in these circumstances. See *Cawthorne* [1996] 2 Cr App R (S) 445

CHAPTER 17: SEXUAL OFFENCES

(1) Alerting the Jury to the Danger of Assumptions

Introduction

Trials of non-consensual sexual offences

1. Trials of complaints of non-consensual sexual offences such as rape may, and often do, present the jury with conflicting versions of events which took place in private between two people. There may or may not be evidence of a complaint made shortly after the event and evidence that the complainant was distressed. If the defendant's case is consent, or a reasonable belief in consent, it will be suggested that the explanation for the distress is the complainant's change of mind, perhaps induced by a sense of shame after the event. In the absence of evidence of relevant injury to the complainant, or protests heard by others, the jury is faced with the difficult task of resolving the questions whether they are sure that (i) the complainant did not in fact consent and (ii) the defendant had no reasonable grounds for believing that she did. They have only the evidence of the two participants upon which to make their decision.
2. The complainant and the defendant may be known to one another in a social setting. There may be evidence of consensual acts of familiarity, perhaps sexual familiarity, between the complainant and the defendant, on which the defendant relies as the foundation for his claim that the complainant was consenting or that he reasonably believed the complainant was consenting to the sexual acts alleged.
3. In circumstances such as these it is, perhaps, not surprising that jurors have recourse to personal standards of behaviour and demeanour, or to perceived standards of behaviour and demeanour, by victims of sexual offences when attempting to resolve the conflict in the evidence.
4. The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

Recognition of the Limits of Judicial Comment

5. In *MM*⁶⁴³, *D*⁶⁴⁴ and *Breeze*⁶⁴⁵ the Court of Appeal has recently been confronted by complaints from the appellant that the trial judge went too far in making such comment upon defence criticisms of the complainant's behaviour and demeanour.

Footnotes

⁶⁴³ [2007] EWCA Crim 1558

⁶⁴⁴ [2008] EWCA Crim 2557

⁶⁴⁵ [2009] EWCA Crim 255

6. In *MM* the criticism was of a delay of some years by the defendant's step-children, then aged between 8 and 13, before making complaints of rape and indecent assault. The defence was fabrication. The trial judge gave an appropriate warning to the jury about the difficulties faced by the defendant in responding to a stale complaint. He then continued:

"You are entitled to consider why these matters did not come to light sooner. The defence say it is because they are not true. The allegations are fabricated. Had they been true, they say, you would have expected a complaint to be made earlier and certainly when the defendant was out of the way. The prosecution say it that it is not as simple as that. When children are abused, they are often confused about what is happening to them and why it is happening. They are children. That is something which you should have in the forefront of your minds when considering this. They might have some inkling that what is going on is wrong. Sometimes children even blame themselves when there is obviously no need for them to do so. A child can be inhibited for a variety of reasons from speaking out. They might be fearful that they may not be believed, a child's word against a mature adult, or they might be scared of the consequences, or fearful of the effect upon relationships which they have come to know. The difficulties, you may think, are compounded in the family situation where they involve a family member for whom the feelings of the child may be ambivalent. The child may not like the abuse but there may be aspects of the abuser that causes the child to view them with some degree of affection. The fallout from disclosures can be unpredictable and sometimes calamitous. So, if a child or children are abused, they are often subject to very mixed emotions, and that can be the case particularly where there is an imposing adult in the household of whom they are perhaps afraid and who has overborne them and has power over them and warned them if they tell.

Whether any of that applies here is a matter for you. Equally, there are sometimes in lives, sometimes earlier, sometimes later, when there is a trigger, or the need arises, to disclose, speak out. No easy thing to do, you may think, and it takes some courage to do so.

Ladies and gentlemen, I make clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether you find that there is a reason for the delay here, and of course it also affects the honesty and the truthfulness of the two girls.

You have heard explanations and it is entirely a matter for you but you may think that some of the things they said on the video and to you, K 'He told me I would get the blame. It's our secret', R, 'I didn't know whether they would believe me or him', both of them scared to an extent. 'I was worried about what would happen. I was worried about his reaction, what people might say.' It is a matter for you but you may think some of those reactions, if they are true, mirror some of the matters I have just been speaking about.'

While not giving an emphatic endorsement, the Court of Appeal decided that these remarks did not exceed the bounds of permissible comment.

7. In *D* the defendant and the complainant had co-habited for a period of years, but the relationship deteriorated, during which time the defendant became increasingly aggressive. He was charged with four offences of rape taking place over a period of weeks. The circumstances of the last incident were particularly unpleasant. The defence was consent. The complainant had an opportunity to complain on the day of the last incident when the police were called to the house, but she did not take it. The defence made much of her failure to complain in cross examination. The complainant explained that she had felt unable to speak openly because there were several officers present, the atmosphere was not right, and she felt ashamed. Only two days later, when she was speaking to a single police officer, did she feel able to give expression to her complaint.

8. The defendant appealed on the ground that the judge had exceeded legitimate comment in describing how the complainant, having been the victim of a ferocious rape, may have felt when confronted by several police officers in whom she could not confide. The respondent was represented by the Solicitor General, who sought to support the judge's approach by reference to material made available to judges by the Judicial Studies Board, in particular the research and expertise of Dr Fiona Mason. Parties are not permitted to introduce generic expert evidence of the range of known reactions to non-consensual sexual offences. The Court of Appeal decided that the trial judge was entitled to comment upon the way in which the evidence should be approached where there was a danger that the jury might reach an unjustified conclusion without it. The situation was analogous to those in which the trial judge warns the jury against apparently persuasive, but possibly mistaken, evidence of identification (*Turnbull*), or against jumping to a conclusion of guilt from a defendant's lie (*Lucas*). The difference was only that on the present occasion the comment was made in fairness to the complainant rather than in the interests of the defendant. In both instances, however, it is suggested that the advice is given in the interests of securing the overriding objective of dealing with cases "justly".
9. The judge had been entitled to comment but only to the extent that his comment was uncontroversial. Latham LJ said:

"The judge is entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning. We think that cases where the defendant raises the issue of delay as undermining the credibility of a complainant fall into a similar category save clearly that the need for comment is in this instance to ensure fairness to the complainant. But any comment must be uncontroversial. It is no part of the judge's task to put before the jury Dr. Mason's learning without her having been called as a witness. However, the fact the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint about rape is sufficiently well-known to justify a comment to that effect. The suggested direction...provides an example in very general terms of an appropriate form of directions which should be tailored to the facts of the case. In the present case, the judge was entitled to add to that general comment, the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. He was also entitled to remind the jury of the way in which the complaint in fact emerged, as explained by the complainant herself."

The Court did not, however, approve of the terms in which the judge's warning had been expressed; in particular, it was not appropriate to emphasise how a woman might feel if she was the victim of rape within a relationship. The comments made should form part of a balanced exposition of the cases for both the prosecution and the defence. Nevertheless, the verdicts were safe.

10. The 'suggested direction' referred to by Latham LJ in the passage quoted at paragraph 5 above was as follows:

"Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you."

11. In *Breeze* the defendant was charged with sexual abuse of his step-daughter when she was aged 8-14. The abuse allegedly stopped at that age because the complainant was able to stand up to the defendant, but no complaint was made until after her marriage 11 years later. The Court of Appeal allowed an appeal against conviction because the trial judge repeated on several occasions that there was no obvious motivation for the complainant to tell lies. The Court of Appeal could not exclude the possibility that the jury may have been influenced by the 'refrain'.

Mistaken assumptions

12. Research by those who are expert in the subject⁶⁴⁶ discloses several subjects for stereotyping which could lead the jury to approach the complainant's evidence with unwarranted scepticism. They include but are not limited to:

The complainant wore provocative clothing; therefore he/she must have wanted sex

The complainant got drunk in male company; therefore he/she must have been prepared for sex

An attractive male does not need to have sex without consent

A complainant in a relationship with the alleged attacker is likely to have consented

Rape takes place between strangers

Rape does not take place without physical resistance from the victim

If it is rape there must be injuries

A person who has been sexually assaulted reports it as soon as possible

A person who has been sexually assaulted remembers events consistently

13. Judges who try sexual offences are aware that each one of these stereotypes does not accord with experience. The purpose of comment, approved by the Court of Appeal in *D*, is merely to caution the jury against making unwarranted assumptions about the behaviour or demeanour of the complainant if the judge considers the circumstances require it. It is essential that advice from the trial judge does not implant in the jury's minds any contrary assumption. It is not the responsibility of the judge to appear to support any particular conclusion but to warn the jury against the unfairness of approaching the evidence with *any* pre-formed assumptions.
14. Assistance such as that proposed should not, we propose, be given without discussion between the judge and the advocates before speeches. The judge should take the opportunity to formulate his words carefully having received the views of the parties, the object being to ensure he does not stray from the commonplace to the controversial and, thus, appear to be endorsing argument for one side at the expense of the other.

Footnotes

⁶⁴⁶ E.g. Dr Fiona Mason's paper 'The Psychological Effects of Serious Sexual Assault: A Guide' and Powerpoint Seminar November 2008, JSB training website; Home Office Research Study 237 Rape and sexual assault of women March 2002 <http://www.homeoffice.gov.uk/rds/pdfs2/hors237.pdf>; Temkin and Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* www.hartpub.co.uk; Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility Ellison and Munro *Br J Criminol.* 2009; 49: 202-219 <http://bjc.oxfordjournals.org/cgi/reprint/azn077?iijkey=FFeruz5D5tBKVOz&keytype=ref>. Some jurisdictions have already legislated for jury directions based on such research.

Directions

Judicial advice should be crafted and expressed in a fair and balanced way. The trial judge should not be, or be seen to be, endorsing the arguments deployed by the prosecution but ensuring that the jury is approaching the evidence without being hampered by any unwarranted assumptions.

The following *Illustrations*, which have been developed and adapted from work done by HH Judge Peter Rook QC and others participating in the JSB's Serious Sexual Offences Seminars (including the 'suggested direction' at paragraph 10 above), can be adapted or expanded to deal with the evidence in the case. They are unlikely to offend any of the principles identified by the Court of Appeal. Their appearance in the Benchbook should not, however, be regarded as a suggestion that any one of them should be used in any particular case. Whether to give any advice at all on the subject of assumptions and, if so, in what terms to express it, are entirely for the judgement of the trial judge.

Illustration – avoiding judgements based on stereotypes

It would be understandable if one or more of you came to this trial with assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgement strictly on the evidence you have heard from the witnesses.

Illustration – avoiding assumptions when the complainant and defendant are known to one another

A woman (a man) who has been subjected to a sexual assault obviously undergoes a traumatic experience, whether or not the victim and her (his) attacker are known to one another, and whether or not they have previously enjoyed a consensual sexual relationship. At first thought, you might assume that stranger rape would be far more traumatic, violent and frightening. It can be, but experience tells the courts that this is not necessarily the case. The experience of a victim of rape by someone she (he) knows or trusts may be just as traumatic whether or not physical violence or the threat of physical violence was involved.

Illustration – effect of trauma on demeanour in evidence

You must decide whether you are sure the complainant did not consent to sexual intercourse with the defendant. That will require an assessment by you of the complainant's evidence. I must emphasise that the assessment is for you to make. However, it is important that you do not bring to that assessment any preconceived views as to how a witness in a trial such as this should react to the experience. Any person who has been raped will have undergone trauma whether the defendant was known to her (or him) or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publicly about it in court. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every person has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness' account. It all depends on the character and personality of the individual concerned.

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Let me now remind you of the evidence.....

Illustration – late reporting

It has been said on behalf of the defendant that the fact the complainant did not report what had happened to her (him) as soon as possible makes it less likely that the complaint she (he) eventually made was true. Whether that is so in this particular case is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is matter for you to determine whether, in the case of this particular complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the complainant herself said about her experience and her reaction to it. On this issue the evidence she gave was.....

Illustration – absence of force or the threat of force

The offence charged requires proof that the complainant did not consent and that the defendant did not reasonably believe that the complainant was consenting. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the prosecution's obligation to prove that the defendant used force or the threat of force.

Consent has a particular legal meaning. A person consents only if she (he) agrees by choice, and she (he), at the relevant time, has the freedom and capacity to make that choice. To prove that the complainant did not consent the prosecution must make you sure on all the evidence that the complainant did not give her agreement by an exercise of free choice.

The submission of free choice to repeated demands is not to be confused with consent. For example, submission achieved by persistent psychological coercion so that free choice was overborne will not amount to consent freely given. On the other hand, reluctant but free agreement is not the same thing as submission, and is still consent, even if reluctantly given. It is for you to decide whether, in the context of this particular relationship (or encounter), consent was freely given by the complainant. If you are sure it was not, you must, secondly, decide whether you are sure the defendant had no reasonable belief that it had.

Illustration – some consensual activity – no overt force - lack of resistance

During the course of her evidence it was suggested to the complainant that she could have kicked, struggled, shouted or otherwise objected to what the defendant was doing. In his closing argument counsel has submitted to you that the complainant's failure to protest demonstrates that the complainant was not telling the truth when she told you that, far from consenting, she was petrified with fear, and froze. This is an argument which you should consider with care. When you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the courts is that people who are being subjected to non-consensual sexual activity may respond in a variety of different ways.

The offence charged requires proof that the complainant did not consent and that the defendant did not reasonably believe that the complainant was consenting. It may or may not be accompanied by force or the threat of force, but please note that it is no part of the prosecution's obligation to prove that the defendant used force or the threat of force in order to achieve sexual intercourse.

Consent has a particular legal meaning. A person consents only if she (he) agrees by choice, and she (he), at the relevant time, has the freedom and capacity to make that choice. To prove that the complainant did not consent, the prosecution must make you sure on all the evidence that the complainant did not give her consent by an exercise of free choice. Submission of her free choice to a demand expressed physically or in words is not the same as consent. On the other hand, an exercise of free choice can lead to reluctant agreement and that is not the same as submission. You will need to consider the evidence with care before you decide whether the prosecution has proved that the complainant did not consent to sexual intercourse with the defendant.

Secondly, the prosecution does not have to prove that the complainant communicated her (his) lack of consent by resisting the defendant physically or by shouting at him. It is not the experience of the courts that victims of rape always have injuries to show for it. There is no classic reaction to a demand for unwanted sexual activity. Some people with physical self-confidence will protest loud and long, some will fight, and others will freeze as the realisation dawns that they are in a situation which they cannot control. Freezing is not the same thing as consent freely given.

Thirdly, the fact that the complainant consented to a certain amount of sexual activity does not mean that she was bound to consent to all that the defendant wanted, nor does it mean that by consenting to some activity she was necessarily indicating her consent to everything. The complainant was entitled to exercise a free choice how far she would go and how far she would not.

The complainant's evidence is that, as soon as the defendant made it clear he was going to have sexual intercourse with her (him), she (he) went rigid and told him, No, I don't want to'. He ignored what she (he) said and proceeded nonetheless. The defendant said that because she (he) did not resist him he thought the complainant meant 'yes', so he proceeded.

You need to focus, upon the time the defendant penetrated the complainant, first, on the complainant's state of mind and, second, depending upon your decision, upon the defendant's state of mind.

First, consider the complainant. What were the circumstances in which sexual intercourse occurred? Did a point come beyond which the complainant was not prepared to go? Was the complainant freely consenting to sexual intercourse, or did she (he) freeze, and was she (he), in fear, submitting to a demand she (he) felt unable to resist? If you conclude that the complainant may have given her (his) free consent then you must find the defendant not guilty.

If, on other hand, you are sure the complainant was not freely consenting, you next have to consider the defendant's state of mind. Did the defendant believe that the complainant was freely consenting? Please note that belief in consent is not the same thing as a hope or expectation that the complainant was consenting; nor is indifference whether the complainant was consenting or not. If you are sure the defendant did not believe the complainant was consenting the defendant is guilty of rape. If you conclude that the defendant may have believed the complainant was consenting you will have reached the final question which is: Did the defendant have any reasonable basis for thinking that the complainant was freely consenting. In making this judgement you should take into account any steps the defendant took to ascertain whether the complainant was consenting. The defendant told you that although the complainant said 'No' he believed that because she did not resist him, she must have been consenting. If you are sure the defendant did not reasonably believe that the complainant was consenting, he is guilty of rape. If you conclude that his belief may have been reasonable in the circumstances then your verdict must be not guilty.

Illustration – provocative dress – hard drinking – flirtation – previous sexual relationship

The complainant was in a hen party which went to the nightclub at 11pm. There were 12 young women in the party, all scantily dressed. They were drinking in rounds and many were drunk, as the complainant says she was. They danced with each other and they danced with men. The complainant told you that she danced with men she knew and did not know. She accepted that she was flirtatious with more than one of them. She danced with the defendant with whom she had had sexual intercourse on two previous occasions about 12 months before, during a relationship which had lasted 3 weeks. She kissed him and agreed that she went willingly with him outside the club for a cigarette.

In the course of cross examination, it was suggested to the complainant that she was perfectly prepared for sex that night; that she was broadcasting her willingness by the way she dressed and the way she behaved; that she would not have kissed the defendant if she had not fancied him; that she expected when they went outside that there would be sexual contact between them.

I will summarise the evidence for you in a moment, including the complainant's answers to those suggestions, but, first, I need to address the assumptions which appear to me to underpin counsel's questions. Each of us knows, and it is certainly the experience of the courts, that people young and not so young can behave in a socially disinhibited manner. Scantily dressed young women celebrating in hen parties is by no means unusual, nor is heavy drinking by young women during a night out, nor is flirtatious behaviour in nightclubs. We all know that alcohol and atmosphere can lead to disinhibited behaviour including sexual behaviour. However, there appeared to be an assumption behind counsel's questions that any one of this group of young women, just because they were behaving in an uninhibited manner during their night out, would have been prepared to engage in sexual activity with any man who happened to take a fancy to her, especially if that man was known to her and there had been a previous relationship between them. Is the realistic position this: a woman may or may not be prepared to engage in sexual activity with a particular man, depending upon the circumstances of the encounter and the mutual feelings between them? What you should not do is judge the intentions or inclinations of the complainant on this occasion by the application of a generalised assumption about people's behaviour. What you should do is reach conclusions based upon the evidence.

Illustration – the defendant's assertion of other (and better) opportunities for consensual sexual activity

In answer to questions from his own counsel the defendant told you that he did not need to stoop to rape because he was happily involved in a current sexual relationship with a woman whose photograph he produced. The purpose of these questions, counsel told you, was to demonstrate that the defendant had nothing to gain and everything to lose from engaging in a non-consensual act of intercourse with the complainant. You must, of course, apply your careful judgement to the argument addressed to you. When you do, you should not assume that rape only happens to women who are sexually attractive to their attackers. Experience tells the courts that physical attraction does not necessarily provide a profile either of a rapist or of his victim. Bear in mind that a rape may have less to do with sexual attraction than with the excitement of domination and control over the other person. Circumstances vary and your ultimate task is to decide what happened between these two people.

Illustration – inconsistent complaints

One criticism of the complainant which you will need to consider with care is that she (he) has given inconsistent accounts of her (his) experience. She (he) complained to her (his) flatmate on her (his) return home; she (he) complained to the police the following day; and she (he) made a witness statement following her medical examination. Finally, the complainant gave evidence in a video recorded interview and via the television link to you. I will remind you in a moment of the more significant of those inconsistencies, which the complainant accepted in evidence and sought to explain. Before I do, I need to give you some assistance with your approach to the complainant's evidence.

The experience of the courts is that it is unwise to approach the issue of inconsistency with an assumption that a true account is always consistent, or that an inconsistent account is always untrue. It depends on the circumstances and the individual.

Every person who is a victim of rape suffers trauma to a greater or lesser degree. The quality of our memory is affected by the ability of the mind to take in the details of the experience, register them, and to recall them afterwards. Trauma can interfere with these processes. Experience tells us that the way in which trauma affects memory varies considerably. It may affect a person's ability accurately to lay down in the memory, in the correct sequence, each of the constituent parts of the ordeal. If the trauma did have such an effect, the ability of the witness to recall events consistently is also likely to be affected. I am sure you will appreciate that someone who is involved in a shocking incident may be affected in this way. After the event, some people ruminate constantly on what happened and by that process reconstruct, accurately or perhaps inaccurately, the events which occurred; others hate to confront their memories and do their best to avoid thinking about them. The result is that recall is not always consistent.⁶⁴⁷

If you accept that trauma can affect people, and if the complainant did indeed suffer trauma, you might consider her failure of consistent recall to be understandable.

On the other hand, a person who has made a false complaint may also have difficulty being consistent. The inconsistencies may expose the possibility that the details do not represent a true recall of events but are part of a manufactured account which is difficult to remember consistently. Inconsistent accounts may, therefore, be an indicator that the account as a whole is untrue.

How then should you approach the evidence of the complainant? Each of these inconsistencies needs to be examined with a view to making a decision whether it has significance in relation to the truthfulness of the complainant's account as a whole. I will remind you of the evidence with that task in mind. If, having given due consideration to the defence argument, you are sure that the essential parts of the complainant's account are true, you will no doubt act on that conclusion. But, if you are left in doubt about the truthfulness of the complainant's account, because the inconsistencies cannot be satisfactorily explained, you must find the defendant not guilty.

Sources

Archbold: 20-27a

Footnotes

⁶⁴⁷ For an understanding of professional research into the working of memory and recall see, for example, The British Psychological Society 'Guidelines on Memory and the Law' June 2008; 'Witness Testimony' Heaton-Armstrong, Shepherd, Gudjonsson and Wolchover, Oxford UP 2006; 'Analysing Witness Testimony' Heaton-Armstrong, Shepherd and Wolchover, Blackstone Press 1999

(2) Allegations of Historical Sexual Abuse

Introduction

Delay in the trial of offences of historical sexual abuse is relevant in three ways: first, it will raise in the minds of the jury the question why the complainant waited so long before making a complaint; second, it will affect the quality of the evidence relevant to the matters in issue; third, the defendant may be at a disadvantage in meeting the factual assertions made against him. The second and third features of delay are considered at *R v Smolinski*. This section is concerned with directions to the jury upon the issue why it might be the complainant delayed before making a complaint and the possible effects of that delay upon the credibility of the complainant's evidence.

Directions

Directions to the jury concerning the evidence of the complainant will need to deal with the circumstances in which the complainant felt unable to reveal the subject matter of the complaint during the period concerned. The complainant will usually be describing events which took place during childhood, and the jury will need to assess the reasonableness of the failure of a child to make a complaint within the context of the physical and emotional environment in which the child was living at the time. Once the complainant left that environment or reached adulthood or both, other reasons may be advanced as to why the complainant remained silent, usually including a wish not to disturb painful memories. The trigger for the decision at last to make a complaint may be an adult relationship in which past experiences are exchanged, or a concern that the behaviour about which complaint is now made will be visited by the defendant upon the next generation of children in the family.

In *MM*⁶⁴⁸ the Court of Appeal approved the direction extracted at (1) Caution Against Making Behavioural Assumptions, paragraph 6 in a case in which there was a substantial delay between childhood and the complaints.

When providing the jury with such assistance it should be even-handed. What the judge can do is to assist the jury with the common experience of the court in dealing routinely with such cases and to point out those features of the evidence which will assist them fairly to assess the complainant's explanations.

Illustration – complaint first made when complainant was an adult – suggestion by the defence that the complaint is not true – consideration of reasons for complainant's delay in making her complaint – as a child – as an adult

During cross examination of the complainant it was suggested to her that nothing untoward had happened to her as a child; that if it had, she would have complained at least to another member of the family; that her childhood had imposed on it the responsibility of helping to care for her brother and sisters; and that her motivation for making her current complaint is her jealousy of the defendant's relationship with her mother and their joint relationship with their natural children. Those suggestions have been repeated in the closing argument of counsel for the defendant.

Footnotes

⁶⁴⁸ [2007] EWCA Crim 1558

I will, in a moment, remind you in more detail of the evidence. First, I wish to make some preliminary remarks about the complainant's response to these questions. You are not bound to accept them; whether they are of assistance is for you to judge. Please remember that all decisions concerning the quality and reliability of the evidence are for you to make.

The complainant is the natural daughter of the defendant's wife, and she is the defendant's step-daughter. When the defendant married her mother the complainant became a member of their family. However, the three natural children of the defendant and Mrs A came along in succession shortly afterwards. The first, B, is 9 years younger than the complainant. The complainant told you that the sexual abuse began not long before B was born. After B was born, mother's attention was focused on the babies. Rightly or wrongly, the complainant said she felt the least important member of the household and, at times, isolated and lonely. She said she was told by the defendant from the start that she should say nothing to her mother. If she did, they would both be in trouble. 'It's our secret', he said. The defendant would buy her small gifts and spend time with her, but the complainant thought her mother was too busy with the other children to take her worries to her. The complainant said she felt guilty, but unable to do anything about it. She told you that the last act of abuse took place when she was 14. She agrees that she had become a handful. She left home as soon as she could, at 16, and tried to put an unhappy period of her life behind her. She met her husband when she was 22. Only when her first child was born two years later did she begin to worry again about the treatment she had received at the hands of the defendant. She wanted her daughter to have a satisfactory relationship with her own mother, but could not bear the thought that her daughter might be left alone with the defendant. She decided to reveal the past to her husband who, she said, insisted that she notify the police. That is how these matters came to light.

In order to judge whether the suggestions put to the complainant in evidence have or may have any basis in truth, you will therefore be considering two important periods in the complainant's life, the first, when she was a child, and, the second, when she was an adult, married woman with a child of her own.

It is important that, when you are considering the question why these matters did not come to light when the complainant was still a child, you remember the complainant is providing her present explanation from an adult perspective. She was bound to because she was looking back after many years and trying to explain how she felt as a child. A child, however, does not have the same ability as an adult to bring perspective and judgement to bear on her relationship with others. Life viewed through the eyes and mind of a child may appear very different. You need to consider how this child, aged 9 to 14 years, in the family environment in which she was placed, might have reacted to behaviour from the defendant such as she has now described. It would depend, you may think, upon several factors: among them, the emotional chemistry between members of the family, the personality of the individuals concerned, the nature of the relationship between the adults in the house, and the words spoken between the adults and the child. Does the complainant's description of a feeling of isolation and loneliness within the family unit strike a chord with you? Were there conflicting emotions and loyalties? The complainant has told you that, on the one hand, the defendant gave her welcome attention; on the other, he was sexually abusive towards her. Are these the sort of circumstances in which a young girl might experience feelings of guilt? Might a child who had such feelings identify with the man and be fearful that she too had something to lose from discovery? There is no denying that the complainant had the opportunity to complain to her mother, her friends, her teachers, and members of her wider family. The fact she did not take those opportunities is an important matter for you to consider. But, when you are considering the significance of her failure to complain, you should be careful to place it in the context of her circumstances at the time.

The second period of time which you need to address is that in which the complainant decided to make her complaint to the police. By then she was, of course, an adult. Her perspective on life would undoubtedly have been different. You are asked to consider whether a young woman who left home at 16 might make false allegations of abuse against her stepfather eight years later because she felt alienated from her mother's new family, and bitter that she was treated in a different manner as a child than were her siblings; because she was the eldest by some years and because she was the stepchild. The complainant said that although it was hard work sometimes she was not resentful about that. She told you that her reasons were very specific and related only to the danger to which she thought her own child would be exposed if she was to enjoy a conventional relationship with her grandmother. She told you that she did not see why she should take exceptional measures to ensure that her daughter was never left alone with the defendant because that was bound to lead to questions, and, in any case, it was the defendant's fault she was in this situation at all. It is again important that you do not consider this evidence in the abstract, but that you examine carefully the complainant's explanation for the course she took, when she took it.

The ultimate decision you have to make is whether you are sure the complainant has given truthful and reliable evidence about the defendant's conduct towards her. The period of delay before the complaint was made and the motivation for the complaint being made when it was made are just two features of the evidence which you need to consider. How important they are and how they should be resolved are for you to judge.

Illustration – need to put emotions and assumptions aside

When judging allegations of sexual or physical abuse involving children experience has shown that it is necessary to keep a cool head. It is easy to feel indignant at the idea of this sort of thing happening, and easy to be sympathetic to a witness who seems to be showing difficulty or distress at having to recall and recount an incident which was distressing and unpleasant for her (him). Those are perfectly proper and normal emotions but they do not assist in deciding whether these allegations are satisfactorily proved. As I said to you at the outset of this case you must judge this case on the evidence you have heard. You must put aside any feeling you have about cases such as these and review the evidence you have heard dispassionately. Take into account, if you wish, the emotions and demeanour of the witnesses, but do not allow your own emotions to take over.

You may have read or heard opinions expressed in the media about whether people who allege they have been abused as children tell the truth or tell lies. You may have a view formed in advance as to how you would expect a person making an allegation of child abuse to appear or behave when giving evidence. The experience of the courts is that assumptions of any kind are not likely to assist. You are concerned only with a fair and calm evaluation of the evidence in this case. Your verdict must turn on what you make of that evidence and on nothing else.

You have to be sure that the complainant is telling you the truth and that her (his) evidence is accurate and reliable. By doing that you are applying exactly the same standards as you would in any other criminal trial.

(3) The Evidence of Child Witnesses

Introduction

Procedural matters

1. Section 53(1) and (3), and section 54(2) Youth Justice and Criminal Evidence Act 1999 provide that all persons of whatever age are competent to give evidence unless, on a balance of probability, it appears to the court that the witness is not able to understand questions put and give answers which can be understood.⁶⁴⁹
2. Section 55 of the 1999 Act permits a witness aged 14 or above to give sworn evidence if he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth under oath. If a witness of that age appears to be able to give intelligible answers he is presumed to have sufficient appreciation unless the contrary is shown by evidence. If contrary evidence is given the onus is upon the party seeking to have the witness sworn to establish, on a balance of probabilities, the qualification to be sworn.
3. By section 56 of the 1999 Act any competent witness who is not permitted to be sworn may give unsworn evidence.
4. Corroboration of the evidence of children is no longer required. The former requirement was abolished by section 34(2) Criminal Justice Act 1988. There may, however, be a need to advise the jury of the need for caution before accepting the evidence of a young child where the nature or quality of the evidence appears to require it. Such warnings are no longer routinely given.
5. For discussion of issues of competence and intelligibility of the evidence of child witnesses see 'Testing the Credibility of Children's Evidence', Laura Hoyano, July 2008, JSB website, Criminal/Library/Evidence.
6. For arrangements for child witnesses to give evidence under special measures directions see sections 16 and 21 Youth Justice and Criminal Evidence Act 1999 and Parts 29 and 30 Criminal Procedure Rules.⁶⁵⁰
7. For the appropriate conduct of interviews with child witnesses during the preparation of video evidence see 'Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, Including Children' issued by the Crown Prosecution Service.⁶⁵¹ Note also the importance of expedition in recording the evidence of a very young witness and in ensuring an early trial date.⁶⁵²
8. For standards in handling the evidence of child witnesses, see the important guidance provided by 'Measuring Up: Good Practice Guidance in Managing Young Witness Cases and Questioning Children', Plotnikoff and Woolfson, July 2009.⁶⁵³

Footnotes

⁶⁴⁹ Note the examination by the Court of Appeal (Lord Judge CJ) of the competence of a child of 4 ½ years giving evidence about matters which occurred when she was aged 3 and the safety of the verdict which followed in B [2010] EWCA Crim 4

⁶⁵⁰ For the Criminal Procedure Rules 29 and 30 see http://www.gov.uk/criminal/procrules_fin/contents/rules

⁶⁵¹ http://www.cps.gov/Publications/docs/Achieving_Best_Evidence_FINAL.pdf. See also The Equal Treatment Benchbook Part 4 (Children), Chapter 4.4

⁶⁵² For a recent example, see Malicki [2009] EWCA Crim 365

⁶⁵³ http://www.nspcc.org/Inform/research/Findings/measuring_up_guidance_wdf66581.pdf. See also paper 'Young and Vulnerable Witnesses: Research Summaries', JSB website, Criminal/Seminars/SSOS July 2008/winzip/Item 5.

9. The principal purpose of this section is to address the ways in which the jury's assessment of the evidence of a child may differ from their assessment of the evidence of an adult.

Directions

The trial judge will need to assess whether it is appropriate to say anything at all to the jury about the evidence of child witnesses. However, a child who gives evidence has always viewed the events described through the eyes and with the mind of a child and, where that is so, it will probably be necessary to give the jury some assistance. The function of the judge is not to give expert evidence about the child under consideration but to assist the jury with the common experience of the courts. The advice will concern the different stages of intellectual and emotional development of children, the way in which they experience events, and their ability to register and recall them. The following are suggested Illustrations of such directions.⁶⁵⁴

Illustration – child's experience and understanding not those of an adult – a child may now be aware that behaviour is 'wrong' by adult standards but not understand why – allowance for a child's diffidence in using unfamiliar and 'naughty' words

A most important part of your task is to judge whether the child witnesses have told the truth, and have given a reliable account of the events they were describing. Some of you will have children and grandchildren who are of a similar age to the children who have given evidence. If so, I think you will recognise the sense of the advice I am going to offer you about your judgement of their evidence, but remember that I am speaking of an approach to the evidence and evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.

Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realise that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority - the policeman in the interview, or an advocate in court, or indeed me. That can make it difficult for them. Remember how you normally talk to children of this age. How difficult must it be if the form in which a question put is complicated or challenging or conceptual (such as "How did you feel?" or "Why didn't you?"), and you should bear those difficulties in mind when you consider the answers given.

All decisions about the evidence are for you to make. I only advise caution against judging children by the same standards as you would an adult.

Footnotes

⁶⁵⁴ With acknowledgement and thanks to HH Judge Sally Cahill QC

Illustration – past conduct – young child – difficulty with recalling detail and sequence – conceptual questions

Your task includes the assessment of the evidence of a child aged....At times during the video interview and in evidence, it was apparent that she (he) was having difficulty with some questions and with recall, particularly of detail and sequence. There is a danger that in formal situations we tend to judge children by the same standards as we would an adult. That would be a mistake.

Children do not have the same standards of logic, understanding and consistency as adults do; they do not have the same experience of life as adults do, and are necessarily less sophisticated.

Experience has shown a number of things. A child may not fully understand the significance of activity which is sexual and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She (he) may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she (he) felt some time ago, or why she (he) did or did not take a particular course of action. Those are not the sort of questions which are likely to encourage a meaningful or reliable response.

Your task is to judge whether the essential parts of the witness' evidence were truthfully given and, if so, whether they are reliable. Errors and inconsistencies in detail and in the sequence of events may not, in the case of a child, be any indication of untruthfulness or unreliability on the essential matters. Those decisions are, however, for you to make. Having made due allowance for the age and immaturity of the witness, you should act on her (his) evidence only if you are sure it is right to do so.

Illustration – child witness - abuse in a family setting – late discovery - child's response and recall

One of the issues you are asked to consider is why these matters did not come to light sooner than they did. It is suggested on the defendant's behalf that if this activity was taking place within the family home it must have become apparent to others in the house and it did not. This is a matter which you will need to resolve.

It would be wise to come to this issue without any preconceived idea what family life was like for the child whose evidence you are considering.

During childhood the people a child relies upon and loves most are probably those with whom she (he) lives, and who provide her (his) home. A child will usually accept as the norm whatever happens within that home. One child will know that every night before bedtime she (he) has a bath and is read a bedtime story. That child, if subjected to unwelcome attention, may exhibit unusual behaviour which will be noticed immediately. Another child in a different household will know that her (his) parent always watches television in the evening and she (he) is left to put herself (himself) to bed. Any change in that child's behaviour may not register because the child is not the centre of attention. Both of these children have a family norm, but they are different, and allowances need to be made for those differences.

There is another way in which a child's perception of normality may affect the way she (he) recalls events. Depending upon the individual child and the relationship between the child and the adults in the household, one child may be more compliant than another. One child may, while another will not, accept what her (his) parent does without question and, if it becomes routine or regular, it may not seem to

the child to be particularly memorable. That may affect the way in which the child remembers events when some time later she (he) is asked to say what happened. Experience shows that a child does not always appreciate that what is happening to them in their own home does not also happen in other families, and the child may only come to realise that as she (he) grows older. Even as an adult it is not always easy to say when something which has become routine first happened or how.

The experience of the courts is that an assessment of a child's evidence has to be made within the context of the home life that particular child was leading, and with an appreciation how the immaturity and dependency of the individual child may affect it. These matters are, however, for you to resolve and not for me. You must reach the decision whether you are sure the child's evidence was truthful and reliable in its essentials. If you are not sure, you should not act upon it.

Illustration – 'grooming'

It is not the prosecution case that the complainant was subjected to a sudden or violent assault; rather, it is said that the defendant prepared her (him) to enable the abuse to take place. This is the incremental process known as grooming. It might begin, for example, with the touching of a child in an unthreatening way so that she (he) becomes used to it and progress in small stages to more advanced sexual activity. Such a process may involve touching that may appear to the child to be harmless fun, such as tickling, which in most circumstances it would be. The child may have no idea that she (he) is at any risk. When the touching becomes more intrusive it may, as a result of trust and familiarity, be accepted without fear, distress or dislike as being a normal part of the relationship. That means it may be especially difficult for a child to remember later when and where and how the touching started. This is what grooming is. Whether the prosecution has proved it is what happened in this case is another matter.

Illustration – a child's reason for silence

Children can be confused about what has happened to them; sometimes children blame themselves for what has happened. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable. On the other hand they may simply blank it out and get on with their lives until the point comes when they feel ready to speak out.

These difficulties can be compounded when what happens occurs within the family context and involves a family member who in all other respects is close to the child and who may be in a position of power and influence in relation to that child. Apart from the abuse, the child may feel love or affection for the abuser. The child may feel loyalty both to the abuser and to other family members. She (he) may fear the consequences for herself (himself), for the abuser, or for someone else, such as her (his) mother or siblings. As a result, a child can have very confused and mixed feeling about whether to speak out.

These difficulties can be compounded when what happens occurs within the family context and involves a family member who in all other respects is close to the child and who may be in a position of power and influence in relation to that child. Apart from the abuse, the child may feel love or affection for the abuser. The child may feel loyalty both to the abuser and to other family members. She (he) may fear the consequences for herself (himself), for the abuser, or for someone else, such as her (his) mother or siblings. As a result, a child can have very confused and mixed feeling about whether to speak out.

I mention these possibilities because experience shows that children do not all react the same way to sexual attention from an adult. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make and not for me. Your task is to decide whether you are sure that the complainant has given you a truthful and reliable account her (his) experience.

(4) Consent, Capacity and Voluntary Intoxication

Introduction ⁶⁵⁵

What is consent?

1. For the purposes of Part 1 of the Sexual Offences Act 2003 a person consents to sexual activity “if he or she agrees by choice and has the freedom and capacity to make that choice”.⁶⁵⁶
2. The phrases which explain what the Act means by ‘consent’ are ‘agree by choice’ and ‘freedom and capacity to make that choice’.

Free choice and capacity

3. There is a variety of factual circumstances in which, on application of the statutory test, the complainant will not have been consenting:
 - (i) A victim of rape may have made no choice at all if sexual intercourse was achieved by force;
 - (ii) Her (or his) choice may have been made not to have sexual intercourse, but her (his) will was overcome by force;
 - (iii) But neither force nor resistance is a requirement of rape.⁶⁵⁷ She (he) may have made no choice because she (he) froze with fear;
 - (iv) A choice may have been made by the victim to submit but it was not a ‘free’ choice because the submission was engendered by fear of the consequences of not submitting;
 - (v) She (he) may have made no choice because she (he) had no capacity to make it.

Incapacity of the complainant

4. A capacity to make a free choice may be absent through unconsciousness in sleep or by consumption of drink or drugs.
7. However, the fact that a drunken person is not completely unconscious, perhaps in such a state of drunkenness that she (he) is drifting in and out of consciousness or sleep, does not imply that she (he) either had the capacity to make a free choice or that she (he) did make a free choice. Where a question of capacity arises in the evidence it must be left the jury to decide.⁶⁵⁸
8. All these, and perhaps other, factual situations may arise in a trial for non-consensual sexual offences. Directions to the jury will require a concentration upon the particular facts of the case and the law of consent should be explained through the medium of those facts and not just as an abstract concept.

Footnotes

⁶⁵⁵ See also the evidential presumptions about consent in sections 75 and 76 Sexual Offences Act 2003 which in practice seldom apply.

⁶⁵⁶ Section 74 SOA 2003

⁶⁵⁷ Nor is it a requirement that lack of consent should be communicated to the defendant: *Malone* [1998] 2 Cr App R 447; *Hysa* [2007] EWCA Crim 2056 at §31

⁶⁵⁸ *Hysa* [2007] EWCA Crim 2056

Voluntary intoxication of complainant

9. The state of drunkenness of the complainant is relevant in the following ways:

- (1) Alcohol or drugs may have a disinhibiting effect upon the complainant;
- (2) The complainant may be so drunk that her (his) capacity to consent is removed, **or** she (he) in fact exercises no choice whether to agree or not.

Only a person who has the capacity to make a choice, and agrees by choice freely made, consents to sexual activity. If the issue of capacity arises it must be dealt with in the judge's directions.⁶⁵⁹

Voluntary intoxication of defendant

10. The drunkenness of the defendant provides him with no defence. Touching or penetration must be the consequence of a deliberate (as opposed to an accidental) act, drunken or not. It is not necessary that the defendant should have 'intended' penetration.⁶⁶⁰ The issue of consent by the complainant depends upon the complainant's state of mind. If the defendant claims that he reasonably believed that the complainant consented, there are two issues for the jury to consider: (i) whether the complainant was in fact consenting; (ii) whether the defendant honestly believed the complainant was consenting, a judgement in respect of which the jury will take the defendant as he was, drunk or sober; and (iii) whether his belief was reasonable in the circumstances, an objective judgement which requires the jury to adopt the standard of a sober, not a drunken, defendant.⁶⁶¹ If the defendant was mistaken as to those circumstances, and the jury is sure that the defendant's mistake was made because he was drunk, he will not be able to rely on the consequences of his mistake. Nevertheless, if the defendant's belief was reasonable, although drunken, it was reasonable for the purposes of section 1 SOA 2003.

Directions

The trial judge's directions to the jury on the issue of consent should be expressed within the context of the evidence and should deal with the particular factual issues which the jury will have to decide.

Footnotes

⁶⁵⁹ *Bree* [2007] 2 Cr App R 13, [2007] EWCA Crim 804; *Coates* [2008] 1 Cr App R 3, [2007] EWCA Crim 1471. At §34 of *Bree*, the President said "In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.

⁶⁶⁰ *Heard* [2007] EWCA Crim 125. See, however, the criticism of the Court's *obiter* remarks as to the difference between crimes of basic and specific intent in *Smith and Hogan* 12 ed. page 300

⁶⁶¹ C.f. Archbold 17-116

Illustration – students drinking heavily – some consensual sexual contact – complainant drowsy or worse under the effects of sleep and alcohol – issues of capacity and consent⁶⁶² – relevance of the defendant's own state of intoxication

The prosecution must prove three things:

1. The defendant penetrated the vagina of the complainant with his penis;
2. The complainant did not consent;
3. The defendant did not reasonably believe that the complainant was consenting.

I need to explain how those issues need to be approached in the context of the facts of this case. What is that context? I will remind you of the evidence in more detail later but here is a summary. The complainant and the defendant met in the students' union bar after they had been playing for their respective teams. They both had a great deal to drink. At the end of the evening the defendant walked the complainant home to her flat. They had coffee together. There was some kissing and fondling between them. The complainant said that she told the defendant she had to go to sleep and lay down on the bed. She recalls nothing else until, in the early hours, she woke to find that she was alone. Her jeans were at the foot of the bed. She had one leg still in her knickers. The complainant has no memory of sexual intercourse taking place, is sure that she would not have consented, but has no awareness whether she consented or not. The defendant accepts that the complainant said she had to go to sleep and lay down on the bed. He lay alongside her. After about an hour he started to fondle the complainant. She made some murmuring noises which he took to be an expression of pleasure. He removed her jeans and partly removed her knickers. Receiving no resistance, which he thought meant that the complainant was consenting, he had sexual intercourse with the complainant to ejaculation. He agreed that no word was spoken between them throughout. Asked why he left the flat, he said that he needed to get back to own place to sleep it off – he had an assignment to prepare the next day.

Penetration

There is no issue that penetration took place. The issues for you to resolve concern consent and the defendant's reasonable belief in consent.

Consent

The first issue for you to decide is whether the prosecution has proved so that you are sure that the complainant did not give her consent. Consent, you will realise, is a state of mind which can take many forms from willing enthusiasm to reluctant acquiescence. For the purposes of the charge of rape the Act of Parliament is very specific about the meaning of consent. The complainant consented if, and only if, (i) she had the freedom and capacity to make a choice and (ii) she exercised that choice to agree to sexual intercourse. The agreement need not, of course, be given in words provided that the woman was agreeing with her mind.

Footnotes

⁶⁶² Note section 75(1) and (2)(d) SOA 2003. In this illustration it is assumed that the defendant has adduced sufficient evidence to raise the issue of consent and reasonable belief in consent

You may wonder whether the fact that the complainant had been drinking heavily affects either of those questions. There are two ways in which drink can affect the individual depending upon the degree of intoxication. First, it can remove inhibitions. A person may do things when intoxicated which she would not, or be less likely to do, if sober. Second, she may consume so much alcohol that it affects her state of awareness. You need to reach a conclusion what was the complainant's state of drunkenness and sleepiness. Was she just disinhibited, or had the mixture of sleepiness and drunkenness removed her capacity to exercise a choice?

A woman clearly does not have the freedom and capacity to make a choice if she is unconscious through the effects of drink and sleep. There are, of course, various stages of consciousness from wide awake to dim awareness of reality. In a state of dim and drunken awareness you may or may not be in a condition to make choices. You will need to consider the evidence of the complainant's state and decide these two questions: Was she in a condition in which she was capable of making any choice, one way or other? If you are sure she was not then she did not consent. If, on the other hand, you conclude that the complainant chose to agree to sexual intercourse, or may have done, then you must find the defendant not guilty.

You reach the stage of considering the defendant's state of mind only if you are sure the complainant did not consent.

Belief in consent

The next question is whether the defendant honestly believed that the complainant was consenting. If you are sure that the defendant knew either that (i) the complainant was in no condition to make a choice one way or the other or (ii) the complainant had made no choice to agree to sexual intercourse, then you will be sure that the defendant did not honestly believe that the complainant was consenting. If that is your conclusion, your verdict would be guilty.

If, on the other hand, you conclude that the defendant did believe, or may have believed, that the complainant was consenting, you need to consider the final question which is whether his belief was reasonable in the circumstances.

Reasonableness of belief and the effect of drink

The defendant had also consumed a great deal of alcohol. However, you need to look at all the circumstances as they would have appeared to the defendant had he been sober. Would or should the defendant have realised that the complainant was at best drowsy and at worst unconscious? If so, would it have been reasonable or unreasonable for the defendant to believe that she was consenting? In considering whether the defendant's belief was reasonable you should take account of any steps taken by the defendant to ascertain that she was consenting. The defendant does not claim that he checked to see whether the complainant was aware of what was happening.

If you are sure that the defendant should have realised that the complainant was in no condition to make a choice, or that the complainant was not agreeing by choice, then his belief was unreasonable and your verdict would be guilty. But, if you conclude that the defendant's belief was or may have been reasonable in the circumstances, you must find the defendant not guilty.

I have prepared for you a written Route to Verdict which will enable you, if you follow it, to consider each of these questions in the correct sequence and, by that means, to reach your verdict. Let us read it together.

Illustration – Route to verdict

Please answer Question 1 first and proceed as directed

Question 1

Did the defendant penetrate the vagina of the complainant with his penis?

Admitted. Proceed to question 2

Question 2

Did the complainant consent to the act of penetration? (See Note 1 below)

If you are sure she did not consent, proceed to question 3

If you conclude that the complainant did consent or may have consented, verdict not guilty

Question 3

Did the defendant believe that the complainant was consenting? (See Note 2 below)

If you are sure the defendant did not believe that the complainant was consenting, verdict guilty

If you conclude that the defendant did believe or may have believed that the complainant was consenting, proceed to question 4

Question 4

Was the defendant's belief reasonable in the circumstances? (See Note 3 below)

If you are sure it was not a reasonably held belief, verdict guilty

If you conclude that it was or may have been a reasonably held belief, verdict not guilty

Note 1:

The complainant consented only if, while having the freedom and capacity to make the choice, she agreed to sexual intercourse. You will need to consider whether the complainant was in any condition (while under the influence of sleep and alcohol) to make and exercise a choice, and whether she did in fact exercise a choice. If she did agree to sexual intercourse, it was not necessary for her to communicate that agreement to the defendant, provided that in her mind she was agreeing.

Note 2:

If the defendant was aware that the complainant was in no condition to exercise a choice or that she was making no choice, then he did not believe that she was consenting.

Note 3:

When judging whether the defendant's belief was reasonably held you should consider the circumstances as they would have appeared to the defendant had he been sober. Should the defendant have realised that the complainant was exercising no choice or was in no condition to make a choice whether to have sexual intercourse with him?

Illustration – allegation of rape within long term partnership – issue of consent⁶⁶³

The defendant and the complainant had a long standing relationship; they lived together in Cardiff, they had two children and they had engaged in many acts of sexual intercourse.

It is a fact relevant to the issues of consent and belief in consent that they lived together in a long standing relationship. When sexual intercourse occurs between two people, your approach to the question of consent may well be different in a situation where the parties live together and have lived together for a long time from a situation where, for example, they have just met. The questions which arise are the same in each case; but the answers will be given in the light of all the circumstances and all the evidence, including the fact that they have had a long standing relationship.

In law, a husband or a long-term or a short-term partner, for that matter, can be convicted of the rape of his partner if the constituents of the offence are proved, notwithstanding his relationship with the victim.

In considering whether it is proved that the complainant did not consent, bear in mind that when people enter into long-term relationships or marriage they usually contemplate regular sexual relations. In most partnerships, even not entirely happy ones, there is often give and take between the partners on sexual as on other matters. A female partner may not particularly want sexual intercourse on a particular occasion but because it is her husband or her partner who is asking for it she will consent to sexual intercourse. If such consent is given reluctantly or out of a sense of duty to her partner, it is still a consent.

However, a woman is entitled to say 'no' even to her husband or long-term partner. There is a critical difference between free agreement, on the one hand, and mere submission under coercion, physical or mental, on the other. It is for you to decide whether the prosecution has proved so that you are sure that the complainant did not consent. You need to apply your combined good sense and experience to the evidence you have heard.

Sources

Archbold 20-10, 20-14; Blackstone B3.16/22; Smith & Hogan 12 ed. Pages 673-690, 698-701; Rook and Ward, Sexual Offences Law and Practice, 3rd Ed, 1.71, Supplement 2008, 1.88

Footnotes

⁶⁶³ After the summing up of Pill J (as he then was) in *Mohammed Zafar* (92/2762/W2) approved on appeal

CHAPTER 18: JURY MANAGEMENT

(1) Empanelling the Jury

Procedure for excusing jury service

1. Paragraph IV.42 of the Consolidated Criminal Practice Direction provides:

“Jury service

(IV.42.1) The effect of section 321 Criminal Justice Act 2003 was to remove certain categories of persons from those previously ineligible for jury service (the judiciary and others concerned with the administration of justice) and certain other categories ceased to be eligible for excusal as of right (such as members of Parliament and medical professionals). Jury service is an important public duty which individual members of the public are chosen at random to undertake. The normal presumption is that everyone, unless mentally disordered or disqualified, will be required to serve when summoned to do so. This legislative change has, however, meant an increase in the number of jurors with professional and public service commitments. One of the results of this change is that trial judges must continue to be alert to the need to exercise their discretion to adjourn a trial, excuse or discharge a juror should the need arise. Whether or not an application has already been made to the jury summoning officer for deferral or excusal it is also open to the person summoned to apply to the court to be excused. Such applications must be considered with common sense and according to the interests of justice. An explanation should be required for an application being much later than necessary.

(IV.42.2) Where a juror appears on a jury panel, it may be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case or is closely connected with a prospective witness. Where the length of the trial is estimated to be significantly longer than the normal period of jury service, it is good practice for the trial judge to enquire whether the potential jurors on the jury panel foresee any difficulties with the length and if the judge is satisfied that the jurors’ concerns are justified he may say that they are not required for that particular jury. This does not mean that the judge must excuse the juror from sitting at that court altogether as it may well be possible for the juror to sit on a shorter trial at the same court.”

2. Since the removal of disqualification for certain classes of occupation made by section 321 and Schedule 33 Criminal Justice Act 2003, there will be a need for the trial judge to consider whether a police officer or an employee of the prosecuting service should be stood down from service on a jury on the ground that there would otherwise be an appearance of bias. The trial judge will need to examine the particular circumstances of the forthcoming trial and of the juror to ascertain whether an appearance of lack of impartiality is properly arguable.⁶⁶⁴ The question for the judge is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

Footnotes

⁶⁶⁴ See *Abdroikov* [2007] 1 WLR 2679, [2008] 1 Cr App R 21, [2007] UKHL 37; *Khan* [2008] 2 Cr App R 13, [2008] EWCA Crim 531; *Yemoh* [2009] EWCA Crim 930

3. The judge must discharge the summons of a juror he considers to have an insufficient understanding of English.⁶⁶⁵ He has the discretion to stand down jurors who are not competent to serve by reason of personal disability such as blindness or deafness,⁶⁶⁶ but in the case of a blind juror, there may well be trials not involving the study of documents in which the disability can be accommodated.

Long or controversial trials

4. At the commencement of a long or controversial trial, time spent ensuring that (i) jurors are not liable to suffer a conflict of interest through knowledge of witnesses or close association with the immediate community affected by the alleged offence, and (ii) that jurors can serve throughout the length of the trial, is time well spent.
5. In exceptional cases,⁶⁶⁷ which listing officers routinely identify, a much enlarged jury panel can be summoned for Day 1 and the following procedure adopted:
 - (1) The advocates are requested in advance to prepare a written questionnaire. In it jurors are informed of the *outside* date for completion of the trial, the names of witnesses, their occupations if they are professional witnesses, and the locality from which they come.
 - (2) On Day 1 the jury panel is invited into court where the judge explains in outline what the case is about and the two-stage procedure for selection of the jury. Each juror is asked to return to the waiting area with a copy of the questionnaire. They are asked to write their full name at the top of the questionnaire. When special security measures are in place the jurors can be provided with a numbered questionnaire and a list kept by the jury bailiffs identifying which numbers have been provided to which jurors. The jurors are asked to identify in writing (i) the names of any witnesses they may know, and the context of that knowledge; (ii) any reason (such as employment, self-employment, holidays booked, family commitments, illness) why the juror should be excused service in a trial of such length; and (iii) any other reason why it might be desirable for the juror to be excused (such as prior knowledge of or familiarity with the case). Conventionally, jurors in waiting are informed before they retire that jury service is an important public duty and that it is only in special circumstances that the judge will be able to excuse a juror from service.
 - (3) The completed questionnaires are handed to the judge either for ballot for the final jury or for a preliminary sift from which the final ballot will take place on Day 2. The parties are entitled to see the completed questionnaires if they wish. In open court the names of the jurors or their numbers are called.⁶⁶⁸ As each name or number is called the juror will come forward. If the juror raises no impediment to service in the trial, he or she is added to jury or to the sifted jury panel. If the juror raises any impediment or requests to be excused the judge will consider and deal with it. The process is public. Some jurors will be reluctant to discuss personal matters publicly and will prefer to approach the judge to address him/her personally. Some discretion is permissible provided the matter really is personal and the conversation is recorded. If the judge decides to excuse the juror the reason, if not its details, should be made public. Either the juror will be excused or the judge will require the juror to remain on the jury as balloted or with the sifted panel. In the latter case, when a panel of 20-30 jurors

Footnotes

⁶⁶⁵ Section 10 Juries Act 1974

⁶⁶⁶ *Mason* [1981] QB 881

⁶⁶⁷ For approval of a procedure by which categories of jurors are identified as unsuitable see *Jalil* [2008] EWCA Crim 2910 at §39-45

⁶⁶⁸ For the propriety of the exceptional use of numbers when jury protection is required see *Comerford* [1998] 1 WLR 191, [1998] 1 Cr App R 235

is available the process can stop. The sifted jurors are asked to remain and the others asked to return to their waiting area either to rejoin the panel available for other cases or to be released altogether.

(4) The sifted panel is told that the second stage of the process of selection will be completed in the morning. Its purpose is to enable jurors time for further reflection upon their commitments overnight, and to consult with family members and employers if necessary. They will, if their name is called on the second day, have a further opportunity to make representations as to why they should be excused.

(5) On Day 2 the remaining 20-30 member jury panel returns to court. It is from this panel that the final group of 12 will be selected at random. Names are called and further representations dealt with as necessary.

6. The advantage of this process is that it reduces the prospects of a false start because on the second or third day of the trial a juror remembers a commitment which cannot be avoided or a witness whom he knows.

Challenging jurors

7. There is no power in the court to select a jury on the grounds of religion or race and no objection taken on the grounds of the need for religious or racial representation on the jury can succeed.⁶⁶⁹
8. The following is a note prepared by the Law Commission for the assistance of Lord Lane CJ and Watkins LJ and issued in October 1989 with their approval after the abolition of the right to peremptory challenge by the Criminal Justice Act 1988 section 118(1):

“1. The Judge’s Powers

This Note is principally concerned with the procedure to be followed when the judge is hearing a *challenge* for cause. In addition to his duty to determine challenges, the judge also has a discretion to exclude from service individual jurors who are unlikely to be able properly to discharge their duties because of physical or mental infirmity, or mental preoccupation with, e.g., the impending death of a relative. In a proper case, the judge may exercise that discretion even if neither side enters a challenge.

2. Composition of the Panel and Selection of the Jury

The composition of the panel is the responsibility of the summoning officer, acting under the direction of the Lord Chancellor. The selection of an individual jury from that panel must be determined by ballot in open court (Juries Act 1974, section 11). The judge has no discretion to interfere with either the composition of the panel or the process of selection of the jury. In *R v Thomas* (88 Cr App R 370) which suggests the contrary, the existence of such a discretion was wrongly conceded. The judge’s discretion is limited to the exclusion of individually unfit jurors; see *R v Ford (Royston)*, (1989) *The Times*, 31 July, per Lord Lane CJ.⁶⁷⁰

Footnotes

⁶⁶⁹ *Ford* [1989] QB 868. In *Smith* [2003] WLR 2229, [2003] EWCA Crim 283, the Court of Appeal held that the random nature of jury selection producing an all white jury to try a black defendant charged with section 18 grievous bodily harm to a white victim did not offend Art 6 ECHR or the Human Rights Act 1998

⁶⁷⁰ [1989] QB 868

3. Procedure on Challenge; Preliminary

A challenge may be to the panel or part panel, or to an individual juror; it is important to require counsel immediately to make plain which form of challenge he is pursuing. In addition to the judge's ordinary powers, section 118(2) of the Criminal Justice Act 1988 gives the judge discretion to hear any challenge for cause in camera or in chambers; the nature and grounds of challenge will determine whether he should exercise that discretion, or whether he should hear the challenge in open court. A shorthand note should be taken of all proceedings and in every case the fact of the challenge and the court's decision on it should be entered on the court record.

4. Challenge to the Panel or Part Panel

4.1 Before any jurors in waiting are called into court, counsel seeking to challenge the panel or part panel should submit his written grounds for the challenge, which should be put on the court record.

4.2 At the outset the judge should ensure that counsel understands that (i) a challenge to the panel will only be entertained if the summoning officer has acted consciously and deliberately in breach of his duty to summon the panel on a random basis and (ii) the composition of the panel is the responsibility of the Lord Chancellor and not of the judge (Juries Act 1974 section 5; see paragraph 2 *ante*).

4.3 If it appears to the court that there are *prima facie* grounds on which a challenge to the panel could be supported, the summoning officer should be asked to appear to answer the challenge. If the grounds are contested, the judge must determine after hearing evidence whether it is borne out. The burden is on the challenger to satisfy the court on the balance of probabilities.

4.4 If the challenge is overruled, the jury should be called into court in the normal way. The judge should make no further reference to the challenge. If the challenge is upheld, the judge should adjourn the trial until a new panel can be produced.

5. Challenges to the Individual Jurors

5.1 The present procedure should be followed whereby challenges are made when twelve jurors have been called to the box but before the challenged juror is sworn. The accused should be informed of his right of challenge by the clerk. The formula used at present [now see Archbold (1999) 4-235, page 386]⁶⁷¹ is appropriate.

5.2 On a challenge being indicated the juror should be asked to leave the jury box whilst the remainder of the selected jurors are sworn.⁶⁷² Subsequent challenges should be dealt with in the same way. Then, if counsel can state the grounds of challenge without prejudicing his client in the eyes of the jury, or embarrassing the juror concerned, the judge may be able to deal with the matter in open court briefly and informally (e.g., in a case where the ground is that a juror is related to a potential witness).

Footnotes

⁶⁷¹ See Archbold (2009) 4-234/236

⁶⁷² Practice varies. It is perfectly permissible for the challenged juror to be replaced immediately or to be replaced at any time before the defendant is put in charge: *Bhogal* [1985] 81 Cr App R 45

5.3 Where it is not possible to deal with the matter informally, the judge should ask the sworn jurors to retire to their room in the charge of the jury bailiff and the remainder of the panel should be asked to leave the court for the time being. The challenged juror should be kept outside the court in the care of an usher but close by in case it is necessary to question him.

5.4 The judge must next decide whether to hear the challenge in open court or to exclude the public and the press. If the grounds of challenge make it desirable in the interests of justice and of the challenged juror to close the court the judge should announce that the court will sit “as in chambers” and the public and the press should be asked to leave the court. Challenges should not be heard in the judge’s room.

5.5 If the ground of challenge appears *prima facie* valid and the facts are contested the judge must decide the facts. The burden of proof is on the party challenging and is the civil burden. The judge can hear evidence (which should be given on the *voire dire* oath) and himself question the juror and may permit counsel to ask questions directed to the particular ground of challenge alleged; speculative questions seeking to establish the basis for a challenge on different grounds are not permitted.

5.6 After hearing the evidence and any submissions, the judge should announce his findings, which should be recorded on the court record (see paragraph 3 *ante*).

5.7 If the challenge is allowed, the juror should be discharged and a fresh juror called to take his place when the remainder of the jury have returned.⁶⁷³ If the challenge is disallowed, the judge should caution the juror not to disclose to other jurors any of the matters that have been considered in the hearing of the challenge and also not to allow the fact that he has been challenged to influence him in any way.

5.8 In any case in which the matters raised in the challenge might prejudice the trial, the judge should consider making an order under section 4(2) of the Contempt of Court Act 1981.”

5.9. The prosecution has a right, rarely exercised, to invite a prospective juror to stand down.⁶⁷⁴

5.10. For an appropriate explanation to the jury of their function and responsibilities during the trial see Chapter 2 Introductory Words at Commencement of Trial

Sources

Juries:

Qualification: Archbold 4-199/207; Blackstone D13.1/3

Summoning: Archbold 4-208/222; Blackstone D13.7/14

Attendance, Deferral and Excusal: Archbold 4-223/232; Blackstone D13.4/6

Balloting, Swearing and Challenge: Archbold 4-233/252; Blackstone D13.16/4

Footnotes

⁶⁷³ But see para 5.2 above

⁶⁷⁴ *McCann* [1991] 92 Cr App R 239; *Chandler* [1964] 2 QB 322; *Mason* [1981] QB 881

(2) Discharge of a Juror or Jury

Jurors obligation to raise problems with the judge

1. Following *Mirza*⁶⁷⁵ the Court of Appeal issued a practice Direction now incorporated within the Consolidated Criminal Practice Direction:

“Guidance to Jurors

(IV.42.5) The following directions take effect immediately.

(IV.42.6) Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.

(IV.42.7) Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge’s attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.⁶⁷⁶

(IV.42.8) The Judge should consider, particularly in a longer trial, whether a reminder on the lines of the further warning is appropriate prior to the retirement of the jury.

(IV.42.9) In the event that such an incident does occur, trial judges should have regard to the remarks of Lord Hope at paras 127 and 128 in *R v Connors and Mirza* [2004] 2 WLR 201 and consider the desirability of preparing a statement that could be used in connection with any appeal arising from the incident to the Court of Appeal Criminal Division. Members of the Court of Appeal Criminal Division should also remind themselves of the power to request the judge to furnish them with any information or assistance under rule 22 of the Criminal Appeal Rules 1968 (SI 1968/1262) and section 87 (4) of the Supreme Court Act 1981.”

2. The judge has the discretion to discharge a juror when the necessity arises.⁶⁷⁷ The size of the jury should not be reduced below nine.⁶⁷⁸
3. Necessity may arise through illness, although an adjournment of a day or so will usually accommodate temporary indisposition. In *Hambery*⁶⁷⁹ the trial judge discharged a juror who was commencing her holiday on the next sitting day.

Footnotes

⁶⁷⁵ [2004] 1 AC 1118, [2004] UKHL 2

⁶⁷⁶ See Chapter 2 Introductory Words at Commencement of Trial

⁶⁷⁷ See section 16 Juries Act 1974 which assumes the power *Hambery* [1977] QB 924

⁶⁷⁸ Section 16

⁶⁷⁹ *Hambery* [1977] QB 924

4. If a juror has personal knowledge of the defendant(s) which should have been disclosed and would have resulted in an invitation from the judge to stand down, it may be necessary to discharge him.
5. Misconduct by a juror may give rise to necessity. Jurors are customarily provided with comprehensive warnings against discussing the case with others and against seeking information about the case from extraneous sources. A disregard of those warnings will amount to misconduct.
6. The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.

Investigation by the judge

7. Where the judge acquires notice of possible misconduct or irregularity among jurors, he will need to investigate it. It is important not to pre-judge the issue. The jury may, with appropriate directions, be able to continue either as originally constituted or without jurors who have been discharged in consequence of the inquiry. The test is whether the jury is subjectively or objectively biased. Objective bias is the appearance to a fair minded and informed observer, having considered the facts, that there was a real possibility that the tribunal is biased.⁶⁸⁰
8. If the irregularity is external in origin (e.g. overheard conversation between a juror and a member of the public leading to a suspicion of improper discussion of the case), the judge may be able to decide the matter without the involvement of the rest of the jury. In *Ramzan and Farooq*⁶⁸¹ a juror made unauthorised telephone calls to her family from the hotel in which the jury was lodged overnight. The following morning the trial judge conducted a private inquiry of the juror through the court clerk. In the result no harm was done but the Court found that the judge should have questioned the juror in open court.
9. Where the suspected irregularity is internal and affects the jury as a whole it may not be prudent to isolate one or more jurors from the others. In *Orgles*⁶⁸² two members of the jury reported informally to the jury bailiffs that there was friction in the jury room. Those two jurors were questioned in the absence of the others and the Recorder afterwards addressed the whole jury. The Court of Appeal concluded that it would have been more appropriate to have asked the whole jury through their foreman whether they were able to continue and gave general advice as follows:

“Before this court, it was submitted that the procedure adopted by the recorder was wrong so as to amount to an irregularity. We agree. By way of preface, we have sympathy for him: the problem was unexpected; it was unusual (it is not encompassed within the joint experience of the members of this court); there was no precedent to guide him; and counsel could not provide an agreed submission. That said, in the judgment of this court an appropriate approach to the problem is as follows.

Footnotes

⁶⁸⁰ *Sander v UK* [2001] 31 EHRR 1003, [2000] Crim LR 767; *Androikov* [2007] 1 WLR 2679, [2008] 1 Cr App R 21, [2007] UKHL 37

⁶⁸¹ [1995] Crim LR 169

⁶⁸² [1994] 1 WLR 108

- (a) Each member of a properly constituted jury has taken an individual oath to reach a true verdict according to the evidence; or has made an affirmation to the like effect.
- (b) Circumstances may subsequently arise that raise an inference that one or more members of a jury may not be able to fulfil that oath or affirmation.
- (c) Normally such circumstances are **external** to the jury as a body. A juror becomes ill; a juror recognises a key witness as an acquaintance; a juror's domestic circumstances alter so as to make continued membership of the jury difficult or impossible; so far, we give familiar, inevitably recurring circumstances. Less frequent, but regrettably not unfamiliar, is the improper approach to a juror, alternatively a discussion between a juror and a stranger to the case about the merits of the case, in short, that which every jury is routinely warned about.
- (d) Occasionally, as in the instant case, the circumstances giving rise to the jury problem are **internal** to such as a body. Whereas the duty common to all its members normally binds the 12 strangers to act as a body, such cannot always occur. From time to time there may be one or more jury members who cannot fulfil the duty, whether through individual characteristics or through interaction with fellow jury members.
- (e) However the circumstances arise, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial, to that end exercising at his discretion his common law power to discharge individual jurors (to a limit of three: see section 16 of the Juries Act 1974), or a whole jury: see *R. v. Hambery* [1977] Q.B.924 .
- (f) The question arises as to whether and in what circumstances that duty should be exercised by the trial judge in the absence of the jury as a body. As to this, first, there is no doubt but that the judge's discretion enables him to take the course best suited to the circumstances (see *Reg. v. Richardson* [1979] 1 W.L.R. 1316 for an extreme course)⁶⁸³ and frequently it is appropriate to commence and continue the inquiry with the juror concerned separated from the body of the jury. Such a course cannot readily be faulted if the circumstance giving rise to the inquiry is external to the jury as a body; indeed if the problem is an approach to a juror, alternatively some external influencing of a juror, only such a course is feasible. The "infection", actual or potential, of one juror must be prevented if possible from spreading to the rest of the jury, and it is common form to have the individual juror brought into open court with the rest of the jury absent so that the trial judge may make an inquiry in the presence of the defendant and counsel without jeopardising the [trial]. Given that there was this further irregularity, was it material so as to provide a further justification for quashing the conviction? We observe that after this trial proceeded there was no reason to think that this jury did not as a body seek to fulfil its duty. There were no further complaints and the range of verdicts are consistent with being true according to the evidence." [bold emphasis added]

Time for reflection

10. Such eventualities, by their nature, occur unexpectedly. It is sensible not to take precipitate action, unless there is an emergency, and to involve the advocates in the decision making process as soon as possible. If the source of the problem is believed to be external it may be necessary to isolate the juror concerned immediately in the hope that contamination by discussion can be avoided. The advocates should, in any event, be consulted as to the course appropriate to the exigency which has arisen.⁶⁸⁴

Footnotes

⁶⁸³ Discharging a juror, whose husband had died overnight, by telephone without informing counsel

⁶⁸⁴ See, for example *Bryan* [2002] Crim LR 240, [2001] EWCA Crim 2550 at §44

11. On the discharge of a juror or jurors it would be prudent for the trial judge to warn them not to discuss the circumstances with any person in the court centre in which they are engaged. In some circumstances it may be necessary to discharge them altogether from current jury service. In *Barracough*⁶⁸⁵ the trial judge discharged the jury and gave a warning that they should not discuss the matter with anyone else. A new jury was empanelled the following day. In view of the size of the court centre and the explicit warning given, the Court of Appeal held there was no irregularity threatening the safety of the verdict. If the same were to occur in a smaller centre the court might have to discharge the jury from further attendance in that session.

Sources

Archbold 4-253/262; *Blackstone* D13.45/64

Footnotes

⁶⁸⁵ [2000] Crim LR 324

(3) Conducting a View

1. A view of the locus in quo may be requested by one or both of the parties, usually when it is argued that photographs do not give a sufficient impression of scale and proportion, or where the nature of terrain is relevant to issues in the trial. If a view is to be held, it must be held before the jury's retirement.⁶⁸⁶
2. Arrangements should be made in advance and all those attending should know the itinerary and the procedure to be adopted.⁶⁸⁷ It is useful to prepare in a proposed timetable for the use of the participants. The court should assemble at court as usual. At a view the court has simply moved its place of sitting temporarily.
3. A view should be attended by the advocates, the judge, the jury, their jury bailiffs and a shorthand writer. The jury must be accompanied at all times by their jury bailiffs. Other travel arrangements are at the discretion of the judge.
4. All communications between the judge and/or the advocates and the jury should be recorded.
5. The defendant must be permitted to attend a view if he wishes but he is not bound to attend.
6. It is not usually necessary to receive evidence at a view but if evidence is taken it should be within earshot of the judge, jury and the advocates, and recorded. One or both of the parties may wish to point out specific features. Agreement can usually be reached by the parties that a police officer who has no immediate connection with the case can perform the function of pointing out those features which can, if practicable, be included in the written itinerary. Otherwise each side should nominate an advocate to do so. While features can be identified, further comment upon them at the view is undesirable.
7. The jury may have questions at the view. If so, they can be asked to make a note of their questions and the note handed to the judge. The judge will consider the questions with the parties to ascertain whether answers can be provided there and then. If so, the jury can be provided with an agreed answer or evidence can be taken. In either case the communication should be recorded. If the parties require time to consider to adducing further evidence on the subject or to reach agreement, the jury may be told that further evidence will be received at court or a written agreement produced. It may be that a feature has been identified at the view which will require a further plan or photographs.
8. At the end of the view the jury should be accompanied by their jury bailiffs back to court. If, however, no further business is to be conducted at court on that day, the jury can be released upon their return to court until the next sitting day.

Sources

Archbold 4-83/84; *Blackstone* F8.38

Footnotes

⁶⁸⁶ *Lawrence* [1968] 1 WLR 341; c.f. *Nixon* [1968] 1 WLR 577 where the view was held after retirement at the request of the defence

⁶⁸⁷ *M v DPP* [2009] EWHC 752 Admin

(4) The Watson Direction

1. At the commencement of the trial the jury will usually have been advised by the trial judge that it will be their joint responsibility, in due course, to make an assessment of the evidence but that they should defer judgment until all the evidence has been heard. If the jury has received a majority verdict direction they will have been informed that it is desirable, if possible, for the jury to be unanimous in their decision but, if that is not possible, the judge can accept such a majority verdict as the circumstances allow. It may not be appropriate to give the jury any further direction about the desirability of reaching a verdict because the majority verdict direction will have concentrated the jury's mind in that direction.
2. It is a matter for the trial judge whether to say anything further. If anything further is said, it is essential that no undue pressure is exerted on the jury. In *Watson*⁶⁸⁸ Lord Lane CJ formulated a further direction which might be given as follows:

“Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes into the jury-box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily [ten of] you cannot reach agreement, you must say so.”

3. Departure from the words used by Lord Lane is dangerous.⁶⁸⁹

Footnotes

⁶⁸⁸ [1988] QB 690

⁶⁸⁹ *Watson* (*supra*), *Atlan* [2005] Crim LR 63; *Morgan* [1997] Crim LR 593; *Herbert* [2009] EWCA Crim 2518

CHAPTER 19: VERDICT

Unanimous and Majority Verdicts⁶⁹⁰

Introduction

When a majority verdict may be received

1. Subject to the application of section 17 Juries Act 1974, the jury must return a unanimous verdict. Section 17 enables a majority verdict to be returned after the jury has been deliberating for at least two hours. In practice, the minimum period is 2 hours and 10 minutes. By section 17(4) the trial judge, before considering a majority verdict, should allow such period for deliberation as the nature and complexity of the case requires. In long and complex, and multi-handed, cases it may appropriate not to consider a majority verdict direction until the jury has been deliberating for well over a day and, perhaps, longer. It is good practice (and good manners) for the trial judge to invite observations from the advocates when a majority verdict direction is under consideration.

What majority?

2. By section 17(1), if the jury still comprises 12 members, the majority may be 11/1 or 10/2. If they are 11, the majority may be 10/1. If they are 10, the majority may be 9/1.

Practice

3. The Consolidated Criminal Practice Direction IV.46 sets out the procedure to be followed:

“(IV.46.1) It is important that all those trying indictable offences should so far as possible adopt a uniform practice when complying with section 17 of the Juries Act 1974, both in directing the jury in summing-up and also in receiving the verdict or giving further directions after retirement. So far as the summing-up is concerned, it is inadvisable for the judge, and indeed for advocates, to attempt an explanation of the section for fear that the jury will be confused. **Before the jury retire, however, the judge should direct the jury in some such words as the following:**

“As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction.”

(IV.46.2) Thereafter the practice should be as follows: Should the jury return before two hours and ten minutes since the last member of the jury left the jury box to go to the jury room (or such longer time as the judge thinks reasonable) has elapsed (see section 17(4)), they should be asked: (a) “Have you reached a verdict upon which you are all agreed? Please answer Yes or

Footnotes

⁶⁹⁰ See also [Chapter 5 \(10\) Agreement on the Factual Basis for the Verdict](#)

No”; (b) (i) If unanimous, “What is your verdict?”; (ii) If not unanimous, the jury should be sent out again for further deliberation with a further direction to arrive if possible at an unanimous verdict.

(IV.46.3) Should the jury return (whether for the first time or subsequently) or be sent for *after* the two hours and ten minutes (or the longer period) has elapsed, questions (a) and (b)(i) in paragraph IV.46.2 should be put to them and, if it appears that they are not unanimous, they should be asked to retire once more and told that they should continue to endeavour to reach an unanimous verdict but that, if they cannot, the judge will accept a majority verdict as in section 17(1).

(IV.46.4) When the jury finally return they should be asked: (a) “Have at least ten (or nine as the case may be) of you agreed on your verdict?”; (b) If “Yes”, “What is your verdict? Please only answer Guilty or Not Guilty”; (c) (i) If “Not Guilty”, accept the verdict without more ado; (ii) If “Guilty”, “Is that the verdict of you all or by a majority?”; (d) If “Guilty” by a majority, “How many of you agreed to the verdict and how many dissented?”

(IV.46.5) At whatever stage the jury return, before question (a) is asked, the senior officer of the court present shall state in open court, for each period when the jury was out of court for the purpose of considering their verdict(s), the time at which the last member of the jury left the jury box to go to the jury room and the time of their return to the jury box and will additionally state in open court the total of such periods.

(IV.46.6) The reason why section 17(3) is confined to a majority verdict of guilty and for the somewhat complicated procedure set out in paragraph IV.46.3 and paragraph IV.46.4 is to prevent it being known that a verdict of “Not Guilty” is a majority verdict. If the final direction in paragraph IV.46.3 continues to require the jury to arrive, if possible, at an unanimous verdict and the verdict is received as in paragraph IV.46.4, it will not be known for certain that the acquittal is not unanimous.

(IV.46.7) Where there are several counts (or alternative verdicts) left to the jury the above practice will, of course, need to be adapted to the circumstances. The procedure will have to be repeated in respect of each count (or alternative verdict), the verdict being accepted in those cases where the jury are unanimous and the further direction in paragraph IV.46.3 being given in cases in which they are not unanimous. Should the jury in the end be unable to agree on a verdict by the required majority (i.e. if the answer to the question in paragraph IV.46.4(a) be in the negative) the judge in his discretion will either ask them to deliberate further or discharge them.

(IV.46.8) Section 17 will, of course, apply also to verdicts other than “Guilty” or “Not Guilty”, e.g. to special verdicts under the Criminal Procedure (Insanity) Act 1964, verdicts under that Act as to fitness to be tried, and special verdicts on findings of fact. Accordingly in such cases the questions to jurors will have to be suitably adjusted.”

Sources

Archbold: 4-433/440; Blackstone: 18.35/40

APPENDIX: 1

Chapter 15: Defendant's Statements and Behaviour

(1) Lies

(i) Former Specimen Direction 27

"It is alleged [admitted] that the defendant lied to the police [or X] in saying [that], and you are entitled to consider whether this supports the case against him. In this regard you should consider two questions:

1. (If the issue arises) You must decide whether the defendant did in fact deliberately tell [these] lies. If you are not sure he did, ignore this matter. If you are sure, consider:
2. Why did the defendant lie? The mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, and they may possibly be 'innocent' ones in the sense that they do not denote guilt, for example, (add as appropriate) lies to bolster a true defence, to protect somebody else, to conceal some disgraceful conduct [other than] [short of] the commission of the offence, or out of panic, distress or confusion. In this case the explanation for his lies is [....].

If you think that there is, or may be, an innocent explanation for his lies then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason that his lies can be regarded by you as evidence [going to prove guilt] [supporting the prosecution case]."

APPENDIX: 2

Chapter 15: Defendant's Statements and Behaviour

(4) Defendant's Failure to Mention Facts When Questioned or Charged

JSB Specimen Direction (2004) 40.1

"It is desirable to discuss any proposed direction with counsel before closing speeches:

- (a) to consider whether a direction under section 34 should be given at all;
- (b) to identify the precise fact or facts to which the direction should relate;
- (c) to identify the permissible inferences;
- (d) to consider the terms of the direction.

If, for whatever reason, it is decided that no such direction should be given, Direction 44(A) should be given. (*R v McGarry* [1999] 1 Cr App R 377); unless, having discussed the matter with counsel, the judge concludes that it would not be in the interests of justice to do so: *R v Scott Thomas*, unreported (CACD 13 May 2002).

1. Before his interview(s) the defendant was cautioned. He was first told that he need not say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court; and that anything he did say might be given in evidence.
2. As part of his defence, the defendant has relied upon (*here specify the facts to which this direction applies*). But [the prosecution say][he admits] that he failed to mention these facts when he was interviewed about the offence(s). [If you are sure that is so, this/This] failure may count against him. This is because you may draw the conclusion from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case/(*here refer to any other reasonable inferences contended for*)]. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it; but you may take it into account as some additional support for the prosecution's case and when deciding whether his [evidence/case] about these facts is true.
3. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about three things: first, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; third, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer by him.
4. (*Add, if appropriate:*) The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence (here set out the evidence). If you [accept this evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so.

5. *(Where legal advice to remain silent is relied upon, add the following to or instead of paragraph 4 as appropriate:)* The defendant has given evidence that he did not answer questions on the advice of his solicitor/legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence. Take into account also *(here set out any circumstances relevant to the particular case, which may include the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts on which the defendant has relied at the trial)*. Having done so, decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had or may have had an answer to give, but genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him. But if, for example, you were sure that the defendant remained silent not because of the legal advice but because he had no answer or no satisfactory answer to give, and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction I have given you.”

APPENDIX: 3

Chapter 16: Defences

(4) Insane and Non-Insane Automatism

JSB Former Specimen Direction 47 Automatism

“If, because of [the concussion] [the anaesthesia] the defendant’s state of mind was such that, at the time of the [act in question], his ability to exercise voluntary control was totally destroyed, he is not guilty of the offence. The defence has raised this issue for you to consider, but it is not for the defendant to prove that that was his condition; it is for the prosecution to make you sure that it was not.”

Notes

1. See Attorney-General’s Reference (No 2 of 1992) 97 Cr App R 429, 434 where the LCJ said: ‘..... the defence of automatism requires that there was a total destruction of voluntary control on the defendant’s part. Impaired, reduced or partial control is not enough.’ In this case the court decided that reduced or imperfect awareness, described by an expert as ‘driving without awareness’ is incapable of founding a defence of automatism.
2. Malfunctioning of the mind caused by a disease cannot found a defence of non-insane automatism. Temporary impairment of the mind, resulting from an external factor, may found the defence, e.g. concussion from a blow, therapeutic anaesthesia but not self-induced by consumption of alcohol/or drugs (see below): *R v Sullivan* 77 Cr App R 176.
3. The evidential burden is on the defence and it is for the judge to decide whether the medical evidence supports a disease or an “external factor”. (If the former, the jury may require a direction as to the defence of insanity).
4. The prosecution must disprove automatism.
5. Malfunctioning of the mind which does not amount in law to insanity or automatism and does not cause total loss of control is not a defence. *R v Isitt* 67 Cr App R 44.
6. Automatism due to self-induced intoxication by alcohol and/or dangerous drugs:
 - (i) is not a defence to offences of basic intent, since the conduct of the defendant was reckless and recklessness constituted the necessary *mens rea*;
 - (ii) may be raised where the offence is one of specific intent.
7. Automatism not due to alcohol, but caused by the defendant’s action or inaction in relation to drugs (e.g. failure by a diabetic to eat properly after insulin) may be a defence to offences of basic intent unless the prosecution proves that the defendant’s conduct was reckless. For example, in assault cases the prosecution must prove that the defendant realised that his failure was likely to make him aggressive, unpredictable or uncontrolled: *R v Bailey* 77 Cr App R 76.